Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

RODNEY LEVAKE,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 656, *et al.*,

Respondents.

On Petition for Writ of Certiorari
To the Supreme Court of the State of Minnesota

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Rodney LeVake is a high school biology teacher who has been banned from teaching biology. Although LeVake is the only teacher at Faribault, Minnesota's high school with a master's degree in Biology Education, he is the only teacher at the school who is not allowed to teach biology. LeVake was silenced in 1998 after privately questioning some aspects of Darwin's Theory of Evolution. Following a series of Inquisition-style meetings with school officials during which LeVake was asked to explain his heterodoxy, the school district silenced him. LeVake sued. The Minnesota courts have affirmed the school's muzzling of LeVake.

The following questions are presented:

1. Does a public school teacher enjoy a constitutional right of free speech and academic freedom to provide his students with scientific criticisms of Darwin's Theory of Evolution during class time dedicated to the same, where such criticisms are consistent with controlling state graduation standards and local school board policy?

2. Does a school district engage in unconstitutional viewpoint discrimination by removing a teacher from his biology teaching position solely because of his privately expressed questions about some aspects of Darwin's Theory of Evolution?

3. Does a high school teacher enjoy any First Amendment protection for in-class speech?

PARTIES

The names of all parties to the proceedings in the court below are Rodney LeVake, Petitioner; Independent School District # 656, Keith Dixon, Superintendent, Dave Johnson, Principal, and Cheryl Freund, Curriculum Director, Respondents.[1]

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[1] The petitioner is not a governmental corporation. *See* Rule 29.6

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INTRODUCTION

In 1998, Rodney LeVake, a biology teacher at Faribault High School in Faribault, Minnesota, in private conversations with fellow teachers, expressed doubt about the scientific validity of some tenets of Darwin's Theory of Evolution. In response to the District's demand that he put in writing his position on how evolution should be taught, LeVake responded that he would teach the school's prescribed curriculum but would like to accompany his treatment of evolution with an honest look at some of the scientific criticisms of that theory. The district responded by removing LeVake from teaching biology completely. LeVake sued for reinstatement.

The case attracted extensive media attention as the focal point of an ongoing national debate on the teaching of evolution in schools.[1] Nearly lost in the "Scopes-in-reverse" versus "need to protect Science Education" uproar was LeVake, who insisted all along that he only wanted to teach good science by encouraging his students to follow the facts wherever they lead without regard to officially imposed orthodoxies, religious or secular.

Both the state district court and the Minnesota Court of Appeals rejected LeVake's claim that the school district's action constituted a violation of his First Amendment right to free speech and academic freedom. The Minnesota Supreme Court denied LeVake's petition for review.

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[1] *See, e.g.*, Josh Tyrangiel, *The Science of Dissent*, TIME, July 10, 2000 at 60; *CNN & TIME: In the Beginning* (CNN broadcast, July 2, 2000); Amy C. Rea, *Teacher, School Square Off On Evolution*, Boston Globe, Sep. 3, 2000, at A6; John Gibeaut, *Evolution of a Controversy*, 85 A.B.A.J. 50 (1999); Julia Lieblich, *Teacher Wants To Debunk Evolution In School*, Associated Press, Oct. 17, 1999; Patrick Glynn, *Monkey On Our Backs*, National Review, Sep. 13, 1999; Marjorie Coeyman, *Evolution Gets Dismissed From Some Classes*, Christian Science Monitor, Aug. 16, 1999; Andrea Billups, *Biology Teacher Banned For Views Sues School District*, Washington Times, June 6, 1999; Candi Cushman, *Heresy Trials*, World Magazine, Aug. 18, 2001.

The Court of Appeals decision upholding the school district's removal of LeVake based on the content and viewpoint of his speech runs directly contrary to this Court's decisions in *Keyishian v. Board of Regents*, 385 U.S. 589 (1967), *Epperson v. Arkansas*, 393 U.S. 97 (1968), *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), and *Edwards v. Aguillard*, 482 U.S. 578 (1987).

This Court should grant review and summarily reverse or, in the alternative, grant plenary review.

DECISIONS BELOW

The decision of the Minnesota Court of Appeals is reported as *LeVake v. Independent School Dist. #656, et al.*, 625 N.W.2d 502 (Minn. Ct. App. 2001), *rev. denied*, 2001 Minn. LEXIS 434 (Minn. 2001). App. A and App. B. The decision of the Rice County District Court is unreported. App. C.

JURISDICTION

The Minnesota Court of Appeals rendered its decision on May 8, 2001. LeVake's petition for review was denied by the Minnesota Supreme Court on July 24, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS

The First Amendment to the United States Constitution provides as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. AMEND. I.

The first section of the Fourteenth Amendment to the United

States Constitution provides as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. CONST. AMEND. XIV § 1.

STATEMENT OF THE CASE

Plaintiff, petitioner here, brought the underlying action pursuant to 42 U.S.C. § 1983 alleging that his school district employer's removal of him from his biology teaching position violated his rights under the First Amendment and seeking declaratory, injunctive, and other relief.

A. Facts

In 1984, Rodney LeVake was hired by Independent School District No. 656 ("District") as a science and math teacher. App. 3a. In 1997, LeVake, who holds a master's degree in Biology Education, applied for the position of high school biology teacher at the District's Faribault High School. LeVake got the job. *Id.*

The standards governing the teaching of high school biology in the District are found in the "Biology Program Curriculum Proposal" ("Proposal") (App. H), and the "Course Syllabus" ("Syllabus") (App. G). The Proposal states that biology class will teach the student about, among other things, "[e]volution: [n]atural selection and mutations are constantly causing changes in living things." App. 55a. The Syllabus states that the subject of evolution, and other controversial topics in biology, "are sensitive in nature or may be inconsistent with

the values/beliefs of some individuals. Every attempt is made to deal with such material in a sensitive, impartial and open manner." App. 49a-50a.

The teaching of biology in the District is also governed by the Graduation Standards promulgated by the Minnesota Department of Children, Families, and Learning. MINN. R. 3501.0446. App. F. These standards require, *inter alia*, that high school students be able to demonstrate the following understanding *vis-a-vis* concepts in biology, including "biological change over time":

> (1) of how historical and current scientific concepts and knowledge guide scientific inquiries;
> (2) that scientific inquiries are performed to test ideas and predictions and to learn about the natural world;
> * * *
> (5) of how explanations based on evidence adhere to established criteria including empirical standards, logic, openness to criticism, and reporting of methods and procedures; and
> (6) of how traditions govern the conduct of science, including ethics, peer review, and consensus.

MINN. R. 3501.0446 (B)(1)-(6), App. 47a-48a. The State Graduation Standards also require that a student "shall":

> use scientific evidence to defend or refute an idea in a historical or contemporary context by identifying scientific concepts found in evidence; evaluating the validity of the idea in relationship to scientific information; and analyzing the immediate and long-term impact on the individual, society, or both, in the areas of technology, economics, and the environment.

MINN. R. 3501.0446(E), App. 48a.

In the spring of 1998, when LeVake was to teach that part of the course dealing with evolution, he spent one day covering

the topic, which included a correlating lab. App. 4a. During this class, LeVake presented no scientific criticisms, or any criticism, of the theory of evolution. Because the academic year was cut short in 1997-98, none of LeVake's fellow biology teachers spent a significant amount of time teaching evolution either. App. 4a. In fact, before LeVake began the academic year teaching biology, he spoke with Virgil Luehrs, the retiring teacher whose position he was filling, as to how he handled the teaching of evolution. App. 35a. Luehrs told LeVake not to spend much time teaching evolution. *Id.*

At some point in 1998, LeVake expressed certain scientific doubts about aspects of Darwin's theory to fellow teacher, Ken Hubert, in a private, casual conversation. App. 15a. Hubert informed Dave Johnson, the principal, of LeVake's doubts, and Johnson informed Cheryl Freund, the curriculum director. App. 4a.

Shortly thereafter, LeVake was summoned to a meeting with Hubert, Johnson, and Freund. *Id.* At this meeting, Freund asked LeVake whether he ever mentioned religion or the Bible in his biology class and also asked him whether his students knew he was a Christian. App. 15a. In fact, at no time has LeVake ever mentioned religion or the Bible in the classroom. App. 34a.

LeVake was summoned to a second meeting, this one involving Hubert, Johnson, Freund, and the rest of the high school's science department. Johnson asked LeVake to write a position paper explaining how he proposed to teach evolution in biology class. App. 4a. LeVake complied. *Id.* In his position paper, entitled "A position paper on the teaching of evolution, (App. E), LeVake points out a number of scientifically-based criticisms and concerns with the theory of evolution. He does not propose the teaching of anything affiliated in any way with what is commonly referred to as

"creationism."[2] To the contrary, LeVake states,

> I will teach, should the department decide that it is appropriate, the theory of evolution. I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning

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[2]LeVake's position paper cites three works in support of his view that there are reputable scientists who question some basic premises of Darwin's Theory. The first is Michael Denton's *Evolution: A Theory In Crisis; New Developments In Science Are Challenging Orthodox Darwinism*, Adler & Adler Publishers Inc., Chevy Chase, MD (1986). Denton, a molecular biologist and medical doctor, presents "a systematic critique of the current Darwinian model, ranging from paleontology to molecular biology . . . to show why . . . the problems are too severe and intractable to offer any hope of resolution in terms of the orthodox Darwinian framework . . ." *Id.* p. 16.

LeVake also cites Michael Behe's *Darwin's Black Box*, Simon & Schuster, New York, NY (1996). Behe, a professor of Biochemistry at Lehigh University, who writes that "just as biology had to be reinterpreted after the complexity of microscopic life was discovered, neo-Darwinism must be reconsidered in light of advances in biochemistry." *Id.* p. 24-25.

LeVake's third source is Phillip E. Johnson's *Darwin On Trial*, Inter Varsity Press, Downers Grove, IN (1993). Johnson, a law professor at Berkeley and former law clerk for Chief Justice Earl Warren, argues that "we do not know how the immensely complex organ systems of plants and animals could have been created by mindless and purposeless, natural processes, as Darwinists say they must have been . . . The philosophically important part of the Darwinism theory — its mechanism for creating complex things that did not exist before — is therefore not really part of empirical science at all, but rather a deduction of naturalistic philosophy." *Id.* p. 158.

None of these three authors characterizes himself nor could be fairly characterized by others as a "creationist" or advocate of "creation science" as these terms have been understood by this Court. *See Edwards*, 482 U.S. 591-3.

> my class into a religious one. Anything less than this constitutes poor science and that by its very nature science is a questioning discipline.

App. 45a.

Notwithstanding LeVake's representation that he would teach the curriculum as prescribed, LeVake was removed from teaching biology at Faribault Public High School. App. 5a. LeVake appealed this decision to the local Superintendent of Schools, Keith Dixon, but was denied any relief. *Id.*

Following his removal, LeVake learned from a school board member that curriculum director Freund had told him that Levake was removed because the administration concluded that LeVake had a deep internal conflict between teaching biology and his belief in God. App. 19a. LeVake has consistently denied the existence of any such conflict. App. 36a.

B. Proceedings Below

Plaintiff filed suit in the District Court of Minnesota, Rice County, on May 24, 1999. Plaintiff alleged that the school district's removal of him as biology teacher violated his rights of free speech, free exercise of religion and due process of law under the United States and Minnesota constitutions. He sued under 42 U.S.C. § 1983 requesting declaratory and injunctive relief as well as compensatory damages and costs of suit.

1. *The District Court*

The District Court of Rice County granted the school district's motion for summary judgment on June 20, 2000.

The district court rejected LeVake's free speech claim. The court held that, because plaintiff is a teacher and his proposed speech would take place in a classroom, the balancing

test of *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), did not apply. App. 29a-30a. Similarly, LeVake's academic freedom claim was dismissed on the grounds that the District "has the right to control the science curriculum." App. 31a. The District Court rejected LeVake's due process claim on the grounds that plaintiff had suffered no loss of pay, earning capacity, benefits or seniority but was merely shifted to a different teaching post. App. 32a.

The District Court did not specifically address LeVake's viewpoint discrimination argument.

2. *The Court of Appeals*

The Minnesota Court of Appeals affirmed.

Regarding LeVake's free speech/academic freedom claim, the court stated that the "classroom is a 'marketplace of ideas' and academic freedom should be safeguarded." App. 9a. Nonetheless, relying on Seventh Circuit precedent, the court concluded that in-classroom teacher speech was, by definition, not speech on a matter of public concern and, thus, did not trigger the *Pickering* balancing test. App. 9a-10a. Finally, the court held that, because the District did not fire or demote LeVake, his due process claim failed. App. 10a-11a.

As was the case with the District Court, the Court of Appeals failed to address LeVake's viewpoint discrimination argument. In fact, the Court of Appeals apparently adopted as its own the District's position — that LeVake's "belief" about evolution disqualifies him from teaching biology. App. 10a.

3. *The Minnesota Supreme Court*

On July 24, 2001, the Minnesota Supreme Court denied LeVake's petition for review. App. 1a.

REASONS FOR GRANTING THE WRIT

This case presents the Court with an opportunity to reaffirm that public high school teachers are not First Amendment orphans. This Court's frequent and lavish encomia of the fundamental importance of teachers and the free exchange of ideas have, in actual practice, been brushed aside by courts which have never met a "pedagogical concern" which was not "legitimate." *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

Petitioner, Rodney LeVake, was silenced, not for anything he said in the classroom, but merely for holding a contrary viewpoint and expressing a desire to say certain things which the school district deemed out of step with its officially imposed orthodoxy. If the promise of *Epperson* (that even high school teachers enjoy some academic freedom) and the liberal approach of *Edwards* (that teachers may teach a variety of scientific theories about origins) are to have any real meaning, this Court must intervene and give the lower courts a usable test for weighing the competing claims in these kinds of cases.

The decision below conflicts squarely with this Court's longstanding precedents in the area of First Amendment freedoms. This Court should grant review in order to remove any doubt about the transcendent values of free speech and academic freedom.

I. THE DECISION BELOW CONFLICTS SQUARELY WITH THIS COURT'S CASE LAW REGARDING FREE SPEECH AND ACADEMIC FREEDOM IN THE PUBLIC SCHOOL CLASSROOM.

A. The "Transcendent Value" of Academic Freedom

This Court has long held that "First Amendment rights, applied in light of the special characteristics of the school environment are available to teachers and students." *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S.

503, 506 (1969) (noting that the application of First Amendment rights to teachers has been "the unmistakable holding of this Court for almost 50 years"). While this Court has never construed the First Amendment to mean that a teacher enjoys *carte blanche* to teach whatever he chooses, however he chooses, this Court has described in soaring terms the nature and importance of the constitutionally guaranteed right of "academic freedom." *See, e.g., Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding, otherwise our society will stagnate and die"); *see also Wieman v. Updegraff*, 344 U.S. 183, 196 (1952) (Frankfurter, J., concurring) ("To regard teachers — in our entire educational system, from the primary grades to the university — as the priests of our democracy is therefore not to indulge in hyperbole").

As this Court taught in *Keyishian v. Board of Regents of New York*, 385 U.S. 589 (1967):

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. . . . The classroom is peculiarly the marketplace of ideas. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues, [rather] than through any kind of authoritative selection.

Id. at 603 (citations and quotation marks omitted). Indeed, "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Shelton v. Tucker*, 364 U.S. 479, 487 (1960).

The clearest statement of the law applicable to LeVake's First Amendment academic freedom claim, and all but ignored

by the courts below, is, ironically enough, *Epperson v. Arkansas*, 393 U.S. 97 (1968). Epperson was an Arkansas high school biology teacher who challenged the constitutionality of that state's law forbidding the teaching of evolution in public schools. Though this Court disposed of the case by striking down the statute as violative of the First Amendment's Establishment Clause, this Court nonetheless made it clear that "[i]t is much too late to argue that the State may impose upon the teachers in its schools any conditions that it chooses, however restrictive they may be of constitutional guarantees." *Id.* at 107. In other words, it is not enough to say that the state has an "undoubted right to prescribe the curriculum for its public schools." *Id.* Courts of law are "to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief." *Id.*

The notion that scientific criticisms of evolution are, as a matter of constitutional law, out of bounds for public school teachers was of course dispelled by this Court in *Edwards v. Aguillard*, 482 U.S. 578 (1987). In *Edwards*, this Court struck down the Louisiana Balanced Treatment Act, which forbade the teaching of evolution in public schools unless accompanied by instruction in "creation science." The Court invalidated the law on Establishment Clause grounds finding that the primary purpose of the Act was to advance a particular religious belief. *Id.* at 593.

Nevertheless, this Court in *Edwards* expressly rejected the notion that all scientific criticisms of evolution must be barred from public school classrooms:

> We do not imply that a legislature could never require that scientific critiques of prevailing scientific theories be taught . . . [T]eaching a variety of scientific theories about the origins of humankind to school children might validly be done with the clear secular intent of enhancing the effectiveness of science instruction.

Id. at 594. In other words, that which this Court held a legislature may validly require, i.e., teaching scientific critiques of scientific theories, the courts below held that LeVake had, as a matter of law, no right to do.

In fact, the District Court went so far as to say that "[p]laintiff in the instant case has no constitutional right to teach his proposed criticisms of evolutionary theory, though they may be scientifically meritorious." App. 31a (emphasis supplied). This is akin to saying that, if a school's geography curriculum says the earth is flat, any teacher who proposes to question this theory may be removed from teaching geography, though his criticisms may be scientifically meritorious.[3]

What the courts below left out of their analyses, and what this Court will have the opportunity to articulate upon granting *certiorari*, is the practical test to be used in determining the precise contours of the constitutional right of academic freedom. In the instant case, LeVake is not in a situation similar to teachers fired, removed, or reprimanded, for the use of offensive language or sexually explicit discussions.[4]

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[3]The profoundly unscientific results of the Know Nothing approach apparently approved by the Minnesota courts in this case are best described in Jonathan Wells's *Icons of Evolution; Science or Myth?: Why Much of What We Teach About Evolution is Wrong*, Regnery Publishing Inc., Washington, D.C. (2000). Wells holds a doctorate from Berkeley in molecular and cell biology. His book analyzes the use in standard textbooks of some ten famous examples of "evidence for evolution," many of which appear in the textbook LeVake was assigned in Faribault. Wells demonstrates that in each case students are never presented with evidence — acknowledged by Darwinians — that the particular "icon" is questionable at best or, in cases such as the famous "Haeckel's embryos," known to be fraudulent.

[4]*See*, cases collected in Stuller, *High School Academic Freedom: The Evolution of a Fish out of Water*, 77 Neb. L. Rev.

Rather, LeVake was reassigned for wishing to provide his students with scientific criticisms of a scientific theory. *See* App. 31a. Moreover, LeVake's scientific criticisms of evolution, while rejected by the local officials, not only fulfill the requirements of the Minnesota Graduation Standards, *supra*, but the mandates of the School District's Syllabus as well, i.e., to teach evolution "in a sensitive, impartial and open manner." App. 49a. If academic freedom does not extend to the objective presentation of conflicting theories in a public schoolroom — in science class of all subjects — then this Court's previous pronouncements regarding the right of academic freedom will be viewed as devoid of substance.

The decision of the Court of Appeals dismissing LeVake's academic freedom claim conflicts squarely with this Court's First Amendment jurisprudence. This Court should therefore grant *certiorari* and reverse.

B. The Decision Below Reflects the Extensive Conflicts in the Lower Courts on the Issue of Constitutional Protection of Classroom Speech.

It is likely that the decision below, which fails to engage in any meaningful analysis of the principles to be applied in assessing LeVake's First Amendment claim, is a product of the mixed signals this Court has sent in this context. This Court's ringing prose about teachers as the priests of our democracy, *Wieman*, *supra.*, and the First Amendment's mandate to safeguard freedom of speech and inquiry in our educational system, *Epperson*,[5] *supra.*, comes up against *Hazelwood*'s all-purpose judicial rubber stamp of school district decisions: reasonable relationship to legitimate pedagogical concerns. 484 U.S. at 273.

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301 (1998).

[5]It is worth emphasizing that Susan Epperson was a high school teacher, not a university professor.

The lower courts have struggled to strike the constitutionally proper balance between these two interests. Most recently, the Ninth Circuit has noted the unresolved state of this crucial area of the law. *California Teachers Association v. State Board of Education*, 263 F.3d 888 (9th Cir. 2001) ("Neither this court nor the Supreme Court has definitively resolved whether and to what extent a teacher's instructional speech is protected by the First Amendment"). The Ninth Circuit further outlined the fractured state of the law on this subject, pointing out that the circuit courts have used "three different tests to analyze the free speech rights of teachers." *Id.* at n.5.[6]

The court below appears to have struggled considerably in deciding which test to apply to LeVake's claim. The court cited *Hazelwood* in its discussion of LeVake's freedom of religion claim. App. 7a. It then appears to switch to a *Pickering*-type test in addressing his free speech claim. App.

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[6]Courts applying the *Hazelwood* test include: *Vanderhurst v. Colorado Mountain Coll. Dist.*, 208 F.3d 908, 913-14 (10th Cir. 2000); *Lacks v. Ferguson Reorganized Sch. Dist.*, 147 F.3d 718, 724 (8th Cir. 1998); *Silano v. Sag Harbor Union Free Sch. Dist. Bd. of Education.* 42 F.3d 719, 723-24 (2nd Cir. 1994); *Ward v. Hickey*, 996 F.2d 448, 452 (1st Cir. 1993); *Webster v. New Lenox Sch. Dist.*, 917 F.2d 1004, 1008 (7th Cir. 1990).

Courts applying a variation of the test from *Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968), include: *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 978 (9th Cir. 1998); *Boring v. Buncombe County Bd. of Educ.*, 136 F.3d 364, 368-69 (4th Cir. 1998) (en banc); *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 800 (5th Cir. 1989); *Nicholson v. Bd. of Educ., Torrance Unified Sch. Dist.*, 682 F.2d 858, 864-65 (9th Cir. 1982).

At least one case has applied a test apparently developed from *Rust v. Sullivan*, 500 U.S. 173 (1991), essentially denying any First Amendment protection to teachers as mouthpieces of the government: *Edwards v. Cal. Univ. of Pa.*, 156 F.3d 488 (3rd Cir. 1998).

9a. And while paying the customary homage to this Court's paean to academic freedom in *Keyishian*, (App. 9a), the court below reads LeVake out of the protection of the First Amendment based on Seventh Circuit precedent that teachers' in classroom speech is not speech on a matter of public concern,[7] precedent which conflicts with cases from the Sixth and Second Circuits.[8]

To clear up the evident confusion among the lower courts over the proper legal standard to be applied in an area of the law which this Court has described as fundamental to "the Nation's future," *Keyishian*, 385 U.S. at 603, the Court should grant the petition and reverse the decision below.

II. THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENTS REGARDING VIEW-POINT DISCRIMINATION.

Rodney LeVake was removed from teaching biology at Faribault Public High School because of a view he has regarding the scientific merit of some aspects of evolution.[9] The decision below holds that the District was entitled, as a matter of law, to take discriminatory measures against LeVake based solely on his viewpoint or belief "that evolution is not

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[7] *Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972).

[8] *Hardy v. Jefferson Community College*, 260 F.3d 671, 678-81 (6th Cir. 2001); *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Blum v. Schlegal*, 18 F.3d 1005, 1012 (2d Cir. 1994).

[9] LeVake's view that there are objective, scientific reasons for skepticism about parts of Darwin's Theory of Evolution is not a view he holds alone. *See, e. g.*, the two-page manifesto, *A Scientific Dissent From Darwinism*, in the October 1, 2001, The Weekly Standard, in which some one hundred scientists dispute the claim that all scientific evidence supports Darwinian evolution. The signers of the manifesto state: "There is scientific dissent to Darwinism. It deserves to be heard."

a viable theory."[10] App. 10a. In so holding, the Minnesota Court of Appeals did not consider any of this Court's decisions regarding viewpoint discrimination or this Court's decisions regarding content-based speech restrictions. Instead, the decision below simply holds that a school may remove or reassign a teacher based only on the fact that it takes issue with the content of his speech, or the viewpoint of his thoughts.

Such a holding, in light of this Court's First Amendment jurisprudence, cannot stand. It is a well-settled principle of First Amendment law that government officials may not regulate speech based on "its substantive content or the message it conveys." *Rosenberger v. Rector and Visitors of University of Virginia*, 515 U.S. 819, 828 (1995) (plurality opinion) (citing *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 96 (1972)). *See also City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984); *Carey v. Brown*, 447 U.S. 455, 462-63 (1980); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63, 65, 67-68 (1976) (plurality opinion).[11] This Court has described this understanding of the First Amendment as "axiomatic." *Rosenberger*, 515 U.S. at 828.

Viewpoint discrimination "is presumed to be unconstitutional," and where government officials restrict speech based on its content, "the violation of the First Amendment is all the more blatant." *Id.* Based on the foregoing First Amendment principles, this Court held in *Rosenberger* that the government must "abstain" from content-based speech restrictions when the "ideology or the opinion or the perspective

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[10]In fact, LeVake makes clear that he questions only parts of the theory of evolution. For instance, he asserts his unqualified acceptance of natural selection as the primary mechanism for evolution. App. 42a.

[11]For a discussion of viewpoint discrimination in the context of teaching about evolution in schools, *see* DeWolf, Meyer and DeForrest, *Teaching the Origins Controversy: Science, or Religion, or Speech?*, 2000 UTAH L. REV. 39 (2000).

of the speaker is the rationale for the restriction." *Id.* (citing *Perry Ed. Assn. v. Perry Local Educators' Ass'n.*, 460 U.S. 37, 46 (1983)).

According to the Syllabus, the Proposal, and the State Graduation Standards, evolution is a subject to be taught in Faribault High School's biology class. During his one year teaching biology, LeVake taught evolution. App. 4a. LeVake also assured the District he would teach evolution in the future. App. 36a. Despite this, however, and despite the fact no one disputes LeVake's qualifications to teach biology,[12] the District chose to reassign LeVake based on its misunderstanding of LeVake's viewpoint *vis-a-vis* the theory of evolution.

The District's agents, specifically Freund, saw what they believed to be a conflict between LeVake's religious beliefs and his obligation to teach evolution as part of the biology course. App. 19a. Based on this supposed "conflict," the District believed that LeVake was incapable of teaching a subject he was educated to teach, able to teach, and willing to teach.[13]

The District impermissibly declared LeVake's viewpoint regarding evolution *anathema* and removed him from teaching biology because of it. This they cannot do. While a school enjoys wide discretion to control its curriculum, viewpoint discrimination, as consistently taught by this Court, can never constitute a legitimate concern.

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[12] As noted by the District Court below, there is no dispute that LeVake, who holds a master's degree in biology, is qualified to teach biology. App. 14a.

[13] The assurance given by the biology course Syllabus that evolution will be taught "in a sensitive, impartial and open manner," (App. 49a), obviously implies that there is more than one viewpoint on the topic; hence, the need for impartiality. The District's action against LeVake is especially hard to fathom given this tacit admission.

The District's concerns were focused solely on LeVake's views and were not directed toward his methods. To remove him, therefore, from teaching biology, based on his viewpoint alone, is not permissible. If this were the case, a teacher who personally finds socialism a superior economic theory to capitalism could be removed from teaching economics based on her belief alone; or a teacher who privately thinks *Bush v. Gore* a bad decision could be removed from teaching high school civics based on this fact alone. In the absence of any evidence that LeVake's viewpoint would affect directly the manner in which he would teach biology, the District's actions constitute impermissible viewpoint discrimination.

In failing to find the District's actions impermissible viewpoint discrimination and in failing even to address the issue of viewpoint discrimination, the decision below is in direct conflict with this Court's precedents.

This Court should grant review and reverse the decision.

CONCLUSION

For the foregoing reasons this Court should grant the petition and reverse the decision below.

Respectfully submitted,

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Attorney for Petitioner

DATED: October 22, 2001

APPENDIX

APPENDIX A

STATE OF MINNESOTA

IN SUPREME COURT

C8-00-1613

Rodney LeVake,

Petitioner,

vs.

OFFICE OF
APPELLATE COURTS
JUL 24 2001
FILED

Independent School District # 656, Keith Dixon, Superintendent, Dave Johnson, Principal, and Cheryl Freund, Curriculum Director,

Respondents.

ORDER

Based upon all the files, records and proceedings herein,

IT IS HEREBY ORDERED that the petition of Rodney LeVake for further review be, and the same is, denied.

Dated: July 24, 2001

BY THE COURT:

\s\Kathleen A. Blatz
Kathleen A. Blatz
Chief Justice

APPENDIX B

STATE OF MINNESOTA
IN COURT OF APPEALS
C8-00-1613

Rodney LeVake,
Appellant,

vs.

Independent School District # 656;
Keith Dixon, Superintendent;
Dave Johnson, Principal; and
Cheryl Freund, Curriculum Director,
Respondents.

Filed May 8, 2001
Affirmed
Foley, Judge

Rice County District Court
File Np. CX-99-793

Wayne B. Holstad, 3535 Vadnais Center Drive, St. Paul, MN 55110 (for appellant)

Kay Nord Hunt, Ehrich L. Koch, Sheila Bjorklund, Lommen, Nelson, Cole & Stageberg, P.A., 1800 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402 (for respondents)

Considered and decided by Peterson, Presiding Judge, Shumaker, Judge, and Foley, Judge.

OPINION

FOLEY, Judge[1]

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[1] Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

Appellant, a high school science teacher, challenges the district court's summary judgment in favor of respondents school district, superintendent, principal, and curriculum director. Appellant argues that he presented a genuine issue of material fact precluding summary judgment on the issue of whether respondents violated his rights of free exercise of religion, free speech, and due process by reassigning him to teach a different class after discovering that appellant wanted to teach criticisms of evolution. Appellant also argues that the district court erred by excluding a portion of his deposition testimony as hearsay and considering a videotaped interview of appellant. Because appellant refused to teach his assigned class in the manner prescribed by the established curriculum, we conclude that he did not present any genuine issue of material fact, and we affirm.

FACTS

In 1984, appellant Rodney LeVake was hired by respondent Independent School District # 656 as a high school science and math teacher. According to LeVake's contract, he could be assigned to teach any topic for which he has licensure. During the summer of 1997, LeVake was offered a position to teach tenth-grade biology for the 1997-98 academic year. Before accepting the position, LeVake met with Ken Hubert, co-chairman of the high school science department, and Dave Johnson, the high school principal, to discuss the course and its curriculum requirements. As part of the tenth-grade biology course, LeVake was required to teach evolution. The curriculum for the course is governed by the "Biology Program Curriculum Proposal" (the proposal) and the "Course Syllabus" (the syllabus). The proposal states that upon completion of the class, students will be able to understand that evolution involves natural selection and mutations, which constantly cause changes in living things. In the required course book for the biology class, three chapters dealt with evolution but only one was required as part of the curriculum. None of the chapters addressed alternative theories to or criticisms of evolution. The syllabus provided examples of topics that should be covered in class, which included evolution. Minnesota's high school graduation standards do not specifically refer to evolution; rather, the standards provide

that a student must demonstrate an understanding of biological change over time. Minn. R. 3501.0446, subp. 2 (1999).[2]

LeVake accepted the position and began teaching the class with full knowledge of the curriculum requirements. In spring 1998, when LeVake arrived at the evolution component of the course, he spent only one day covering the topic, which included a correlating lab. The school year was cut short that year, so none of the other biology teachers spent a significant amount of time teaching the evolution chapters either. Hubert expressed concern to Johnson that LeVake did not adequately cover evolution and also discussed the situation with LeVake. LeVake essentially told Hubert that he could not teach evolution according to the prescribed curriculum. On April 1, 1998, LeVake met with Hubert, Johnson, and Cheryl Freund, the curriculum director, to discuss the issue. LeVake indicated that he did not regard evolution as a viable scientific concept. At that time, Freund asked if LeVake mentioned God or the Bible in class because she wanted to be sure that LeVake was not discussing religion in a manner that would give the impression that the school was not religiously neutral.

On April 7, 1998, LeVake, Hubert, Johnson, Freund, and the rest of the high school's science department met to discuss LeVake's teaching methods. At that meeting Johnson asked LeVake to write a position paper on how he proposed to teach evolution in his biology class. LeVake completed this paper on April 15. In his paper, LeVake articulated that he believes evolution is impossible from a "biological, anatomical, and physiological standpoint" and that there is "no evidence to show that it actually occurred." LeVake's paper also contends that the "complexity of life that we see around us is a testimony that evolution, as it is currently being handled in our text, is impossible." LeVake concludes by writing:

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[2] If there is to be any change in the required standards, the suggested change should be addressed to the school board and, if necessary, to the state legislature and tested by constitutional limitation.

> I don't believe an unquestioning faith in the theory of evolution is foundational to the goals I have stated in teaching my students about themselves, their responsibilities, and gaining a sense of awe for what they see around them. I will teach, should the department decide that it is appropriate, the theory of evolution. *I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning my class into a religious one.*

(Emphasis added.)

On April 28, 1998, after meeting with the school district's lawyers and consulting with Freund and others, Johnson decided that LeVake should be reassigned to teach ninth-grade natural science for the following academic year. LeVake was informed of this decision the following day. As the basis for the school's decision, Johnson expressed concern that a basic concept of biology, meaning the theory of evolution, would be diluted and that students would "lose the gist" of the theory.

LeVake appealed his reassignment to Superintendent Keith Dixon. On May 14, 1998, Dixon wrote LeVake a letter, affirming his reassignment. Dixon believed that LeVake differed fundamentally with the "commonly held principles of the curriculum as outlined." Dixon further articulated that LeVake's insistence on teaching the inconsistencies of evolution was not an appropriate method for teaching the approved curriculum.

On May 24, 1999, LeVake filed a lawsuit against respondents Independent School District # 656, Keith Dixon, Dave Johnson, and Cheryl Freund (respondents). Based on 42 U.S.C. § 1983, LeVake alleged that respondents violated his right to free exercise of religion, free speech, due process, freedom of conscience, and academic freedom. Respondents moved for summary judgment, which the district court granted. The district court dismissed all of LeVake's claims with prejudice on the merits. LeVake now appeals from the district court's grant of summary judgment.

ISSUES

1. Did appellant raise a genuine issue of material fact as to whether respondents' decision to assign appellant to teach a different class violated his right to free exercise of religion?

2. Did appellant raise a genuine issue of material fact as to whether respondents' decision to assign appellant to teach a different class violated his right to free speech?

3. Did appellant raise a genuine issue of material fact as to whether respondents' decision to assign appellant to teach a different class violated his due process rights by failing to provide him with notice that his method of teaching a high school biology course was inconsistent with the school board's established curriculum?

ANALYSIS

On appeal from summary judgment, a reviewing court asks (1) whether there are any genuine issues of material fact, and (2) whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). No genuine issue of material fact exists "where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *DLH Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538 (1986)). "The party resisting summary judgment must do more than rest on mere averments." 566 N.W.2d at 71. A genuine issue for trial must be established by substantial evidence. *Id. at 70.* A reviewing court "must view the evidence in the light most favorable to the party against whom judgment was granted." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citation omitted).

I. Free Exercise of Religion

The First Amendment to the United States Constitution provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." U.S. Const. amend. I. The First Amendment applies

to the states by virtue of the Fourteenth Amendment. *Cantwell v. Connecticut*, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940).

> The right to believe as one wishes and to practice that belief according to the dictates of conscience, without violating the personal rights of others, is fundamental to our system.

Murphy v. Murphy, 574 N.W.2d 77, 80 (Minn. App. 1998) (citation omitted). If a law of general application "incidentally infringes on religious practices," it does not contravene the free exercise clause. *Id.* (citation omitted). The party asserting a free exercise violation has the initial burden of proving that the state's requirement imposes a burden on the party's religious belief or practice. *Abington Sch. Dist. v. Schempp*, 374 U.S. 203, 223, 83 S. Ct. 1560, 1572, 10 L. Ed. 2d 844 (1963).

It is unclear on what basis LeVake argues that his right to free exercise of religion was violated. LeVake does not contend that respondents prohibited him from practicing the religion of his choice. He does not assert that respondents demanded that he refrain from practicing his religion outside of the scope of his duties as a public school teacher in order to retain his teaching position, and he does not assert that the curriculum requirements incidentally infringed on his religious practice. *Cf. Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273, 108 S. Ct. 562, 571, 98 L. Ed. 2d 592 (1988) (stating educators do not offend First Amendment so long as their actions are reasonably related to pedagogical concerns).

By analogy, LeVake focuses on employment discrimination cases to argue that circumstantial evidence of discrimination based on his religious belief exists, and he concludes that this alleged discrimination equates to respondents' violation of his right to free exercise of religion. *See Sigurdson v. Isanti Co.*, 386 N.W.2d 715, 720 (Minn. 1986) (setting out standard for showing circumstantial evidence of employment discrimination). But LeVake did not bring an employment discrimination action, and he has not provided authority demonstrating how use of this standard raises a genuine issue of material fact regarding his free exercise

claim. Consequently, he has not articulated how an argument based on religious discrimination equates to a violation of his right to free exercise of religion.

Finally, we address LeVake's complaints regarding the evidence that the district court considered in deciding the summary judgment motion. LeVake first argues that the district court erred in failing to consider his deposition testimony as to statements made by Freund, the curriculum director, regarding the reason for LeVake's reassignment. But, LeVake has not shown that these statements create a genuine issue of material fact as to his free exercise claim. Freund's position as the curriculum director did not give her authority to hire, fire, or reassign LeVake, so her opinion on the matter is irrelevant. Principal Johnson had sole authority to reassign LeVake, and Superintendent Dixon had authority to overrule Johnson's decision. Thus, it was Johnson's reason for reassigning LeVake and Dixon's reason for supporting the decision that were germane.

LeVake also disputes the district court's consideration of a CNN video segment, which featured LeVake and others discussing the debate about evolution and creationism. But, he presents no issue for us to decide because the district court found that the tape had "little evidentiary value because it was created and aired almost two years after [LeVake's] reassignment and thus [did] not address the main issue" of the case.

Given respondents' important pedagogical interest in establishing the curriculum and its legitimate concern with ensuring that the school remained religiously neutral, we conclude that LeVake has not presented a genuine issue of material fact as to whether respondents' decision to assign him to teach a different class violated his right to free exercise of religion.

II. Free Speech

Determining a public employee's free speech rights is a difficult task. A reviewing court must analyze the

> balance between the interests of the [public employee], as a citizen, in commenting upon matters of public concern and the interests of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.

Finch v. Wemlinger, 361 N.W.2d 865, 870 (Minn. 1985) (quoting *Pickering v. Board of Education*, 391 U.S. 563, 568, 88 S. Ct. 1731, 1734, 20 L. Ed. 2d 811 (1968)). Further, critical to determining if a public employee's speech is entitled to protection, is whether the speech is "made primarily in the [employee's] role as a citizen or primarily in his role as an employee." *Terrell v. University of Tex. Sys. Police*, 792 F.2d 1360, 1362 (5th Cir. 1986), cert. denied, 479 U.S. 1064, 93 L. Ed. 2d 997, 107 S. Ct. 948 (1987). LeVake has the burden of showing that "his conduct was constitutionally protected, and that this conduct was a substantial factor or *** motivating factor" in respondents' decision to reassign him. *Mount Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287, 97 S. Ct. 568, 576, 50 L. Ed. 2d 471 (1977) (citation omitted). LeVake argues that respondents reassigned him to silence his criticism of evolution, which infringed upon his rights of free speech and academic freedom. He asserts that the material he wants to teach his students is lawful and does not impinge on any important state interests.

The classroom is a "marketplace of ideas," and academic freedom should be safeguarded. *Keyishian v. Board of Regents*, 385 U.S. 589, 603, 87 S. Ct. 675, 683, 17 L. Ed. 2d 629 (1967). But Levake, in his role as a public school teacher rather than as a private citizen, wanted to discuss the criticisms of evolution. LeVake's position paper established that he does not believe the theory of evolution is credible. Further, LeVake's proposed method of teaching evolution is in direct conflict with respondents' curriculum requirements. *See Clark v. Holmes*, 474 F.2d 928, 931 (7th Cir. 1972) (recognizing teacher had no First Amendment right to override judgment of superiors regarding proper course content). Accordingly, the established curriculum and LeVake's responsibility as a public school teacher to teach evolution in the manner prescribed by the curriculum overrides his First Amendment rights as a private citizen. *See Webster v. New*

Lenox Sch. Dist. No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990) (recognizing compelling state interest in choice and adherence to suitable curriculum for benefit of young students overrides individual teachers' desire to teach what they please).

Based on LeVake's belief that evolution is not a viable theory, respondents' concern about his inability to teach the prescribed curriculum was well-founded. Thus, the district court did not err in granting respondents' motion for summary judgment because LeVake did not demonstrate a genuine issue of material fact regarding his claim that respondents violated his right to free speech.

III. Due Process

For a procedural due process claim, a teacher must establish that the school administration's action to which the teacher is objecting deprived the teacher of a constitutionally protected liberty interest. *See Board of Regents v. Roth*, 408 U.S. 564, 568-75, 92 S. Ct. 2701, 2704-08, 33 L. Ed. 2d 548 (1972) (concluding university did not violate nontenured teacher's protected liberty interest by deciding not to re-employ him without stating its reasons or providing hearing). Rights to free speech and free exercise of religion are protected liberty interests. *City of Boerne v. Flores*, 521 U.S. 507, 519, 117 S. Ct. 2157, 2163, 138 L. Ed. 2d 624 (1997). The school board may regulate a teacher's speech in the classroom if it has provided the teacher with specific notice of what conduct is prohibited. *See Keyishian*, 385 U.S. at 604, 87 S. Ct. at 684 (stating government must clearly inform teachers of types of prohibited classroom speech).

LeVake's due process claim is premised on his belief that respondents deprived him of his liberty interest to teach his class free "from state action which impinges upon and violated his constitutional rights to free speech and free exercise" by failing to provide him with adequate notice of what types of expression were prohibited before reassigning him.

The cases LeVake relies on in making this argument involve the termination of teachers, but LeVake was not

terminated. In fact, he was not even demoted. Further, before accepting the position to teach tenth-grade biology, LeVake understood that respondents' prescribed curriculum included teaching students about evolution.

LeVake was given sufficient notice about what he could and could not teach through the established curriculum and the syllabus. In addition, LeVake's contract specifically required him to "faithfully perform the teaching *** *prescribed by the School Board*," but LeVake articulated that he could not teach the class according to the existing curriculum requirements. (Emphasis added.) In fact, LeVake admitted in his deposition testimony that "in essence [he] said to [Hubert] that [*he could not*] *teach evolution*." (Emphasis added.) Also, LeVake's position paper demonstrates that he does not believe that evolution is a credible theory. More importantly, LeVake's proposal of how he wanted to teach evolution conflicted with respondents' curriculum goals, which dictated that evolution should be taught as the *accepted* theory for how life has changed over time.

Thus, the district court did not err in granting respondents' summary judgment motion because LeVake did not demonstrate a genuine issue of material fact regarding his claim that his due process rights had been violated.

DECISION

Because LeVake's position paper and his statement to Hubert make it clear that LeVake would not teach the required course curriculum in the manner established by the school board, LeVake has not presented any genuine issue of material fact regarding his free exercise, free speech, and due process claims. Thus, the district court did not err in granting respondents' motion for summary judgment.

Affirmed.

APPENDIX C

STATE OF MINNESOTA
COUNTY OF RICE SS
I certify this to be a true copy of the original records now on file in this office.
Dated at Faribault, MN 7/31/00
Rice County Court, Administrator
By: /s/
Deputy Clerk

State of Minnesota	**District Court**
County of Rice	**Third Judicial District**
	CX-99-793

Rodney LeVake
Plaintiff(s),

vs.

Summary Judgment & Memorandum

Independent School District # 656; Keith Dixon, Superintendent; Dave Johnson, Principal; and Cheryl Freund, Curriculum Director,
Defendant(s),

The motion of Defendants for Summary Judgment came on for hearing before the Honorable Bernard E. Borene, Judge of District Court, on May 8, 2000, at the Rice County Courthouse in Faribault, Minnesota. Plaintiff Rodney LeVake appeared in person and through counsel, Wayne B. Holstad, Esq., St. Paul, Minnesota, and Francis J. Manion, Esq., New Hope, Kentucky. Defendants appeared through their counsel, Erich L. Koch, Esq., Minneapolis, Minnesota. The Court took the matter under advisement at the conclusion of the hearing.

Based upon the Order Granting Defendants' Motion for Summary Judgment dated June 20, 2000 the court enters

judgment according:

1. Defendants' Motion for Summary Judgment is GRANTED.

2. All claims against Defendants are DISMISSED WITH PREJUDICE on the merits.

3. Defendants are awarded their costs and disbursements to be taxed herein.

4. Judgment of dismissal herein is STAYED until July 20, 2000.

5. The following MEMORANDUM is incorporated herein by reference.

Date July 20, 2000

/s/ Robert L. Langer
Robert L. Langer
Court Administrator

RICE COUNTY, MINN.
FILED
JUL 20 2000

/s/ CD
COURT ADMINISTRATOR

MEMORANDUM

FACTS

Plaintiff Rodney LeVake is a citizen of the United States and of the State of Minnesota. Prior to the 1997-98 academic year, Plaintiff was employed by Defendant Independent School District #656 ("District") as a natural sciences teacher at the Faribault High School. During the 1997-98 academic year, Plaintiff was assigned to teach biology at the high school. Toward the end of that academic year, he was reassigned to teach ninth grade science at the high school. The District is a school district organized pursuant to Minn. Stat. § 123B.O2 with general charge of the business of the district including Faribault High School. Defendant Keith Dixon ("Superintendent Dixon") was at all relevant times the Superintendent of Schools for the District. Defendant Dave

Johnson ("Principal Johnson") was at all relevant times the Principal of Faribault High School. Defendant Cheryl Freund was at all relevant times Executive Director of Curriculum and Instruction for the District.

Plaintiff graduated from St. John's University in Collegeville, Minnesota, where he majored in natural science and social science. In 1984, Plaintiff received a Master's Degree in Biology from Mankato State University. There is no dispute that Plaintiff is qualified to teach high school biology. There is also no dispute that the contract between the District and its teachers gives the District a managerial right to assign a teacher to any teaching position for which that teacher has licensure.

A position teaching biology became available for the 1997-1998 academic year at the high school upon the retirement of one of the school's biology teachers. Plaintiff was offered that position. Before accepting the position, Plaintiff discussed it with Ken Hubert and Dave Wieber, fellow teachers and the co-chairmen of the high school's science department, as well as with Principal Johnson. Plaintiff stated in his deposition that he knew, at the time of discussing the position, that evolution was part of the course, and he expressed no reservations about teaching evolution. (LeVake depo., p. 101). Plaintiff knew that the course textbook was Biology, Visualizing Life, and he "more than likely" knew that the textbook did not contain what he considered to be the criticisms of evolution. (Id.). Chapters nine, ten and eleven of the text deal with evolution. Plaintiff admitted knowing that, although chapters ten and eleven of the textbook were optional, chapter nine, which concerned natural selection, was required. (Id. at 107).

Plaintiff was appointed to the biology teaching position for the 1997-98 academic year. According to Plaintiffs own deposition, during that year, he covered chapters one through eight "very rigorously", spent one day on chapter nine, skipped chapters ten and eleven, and then taught "compressed" versions

of the textbook's remaining chapters. (Id. at 108). The only thing in chapter nine that Plaintiff remembered covering was a worksheet on the peppered moth. Plaintiff prepared no teaching outline for chapter nine. (Id. at 40). Plaintiff usually prepared outlines for the next two to three weeks in the course when he was finishing up the end of a chapter in the textbook. (Id. at 38).

At some point in the second semester of the academic year, Ken Hubert noticed that, while he and Mr. Koehler had covered chapter nine, Plaintiff appeared to have skipped that chapter. Mr. Hubert was concerned by this because he believed evolution was part of the state graduation standards, and, in his opinion, a failure to teach it amounted to a problem with the curriculum. Sometime in February or March of 1998, Mr. Hubert approached Plaintiff and asked him how he was going to handle the topic of evolution. In his own deposition, Plaintiff stated that he "in essence...said to him I can't teach evolution. That's what I said to him." (Id. at 64). Mr. Hubert expressed his concern to Principal Johnson that Plaintiff was not teaching evolution. Principal Johnson informed Ms. Freund of Mr. Hubert's concerns.

A meeting was held on April 1, 1998, and was attended by Plaintiff, Mr. Hubert, Principal Johnson and Ms. Freund. The purpose of this meeting was to discuss how Plaintiff was handling the topic of evolution in his biology class. Plaintiff stated in his deposition that felt that the others at the meeting assumed he had an internal conflict regarding evolution. However, he could not remember ever having told them his specific beliefs, although he had given Mr. Hubert a pamphlet about alternative explanations for things existing in nature, and thereby assumed that Mr. Hubert knew he was a creationist. (Id. at 139). Plaintiff stated that he had not told Ms. Freund or Principal Johnson what his specific beliefs were. (Id.). During the meeting, Ms. Freund asked Plaintiff whether he mentioned God or the Bible in class, or whether his students knew he was a Christian. However, Plaintiff himself agreed that Ms. Freund was merely checking to ensure that Plaintiff

was not discussing religion in class. (Id. at 140). Plaintiff said in his deposition, "She was getting at if I...tried to convert my class into my way of thinking or." (Id.).

Another meeting was held on April 7, 1998, that included Plaintiff, Ms. Freund, Principal Johnson, Mr. Hubert and the rest of the high school's science department. At this meeting, Principal Johnson asked Plaintiff to write a position paper on how he proposed to teach evolution in his biology class. Plaintiff completed this position paper on April 15, 1998.

In the paper, Plaintiff refers to the difficulties of documenting the "high points of the creation/evolution debate." Plaintiff raised two challenges to evolution: 1) that the process of evolution was impossible and has no evidence to show that it happened; and 2) that the complexity of life testifies against evolution. Plaintiff elaborated upon those two themes. Plaintiff stated that, while natural selection is supported by evidence and that he would teach it without reservation, he did not regard natural selection as a basis for "macroevolution " [defined by Plaintiff as the process causing life to arise from a non-living ancient pond to develop into the creatures that exist today] . Plaintiff stated that his goals were to 1) teach real and practical knowledge that students could use in their role as educated citizens; and 2) to kindle in students an appreciation for the complexities and subtleties of the various forms of life and their systems, Plaintiff averred that, if the department wished, he would teach evolution, but would accompany his teaching with an "honest look" at the difficulties and inconsistencies of evolution without turning the class into a religious one. Finally, Plaintiff stated that proper religious treatment of the creation/evolution debate should be left with a student's family and place of worship.

On April 28, 1998, Ms., Freund, Principal Johnson, Superintendent Dixon and Ron Spies met with Attorney Ann Goering of the Ratwick Law Firm. The participants at the meeting decided that Plaintiff should be reassigned from

teaching biology to teaching natural science to ninth graders. Plaintiff was informed of this decision on the following day.

Ms. Freund wrote a memorandum about this decision to the members of the school board. In the memo, Ms. Freund mentioned that Mr. Hubert had contacted her and stated that the science department suspected that Plaintiff was not following the biology curriculum agreed upon by the science department and believed that he was reluctant to teach evolution as presented in the textbook. Ms. Freund related that Plaintiff asserted at the April 1st meeting that he did not regard evolution to be a viable scientific concept because he believed it could not be proven. Ms. Freund further related that, at the April 7th meeting, members of the science department affirmed the importance of teaching evolution. Finally, Ms. Freund stated that the participants at the April 28th meeting had determined that:

> 1) the District is responsible for ensuring that the district's prescribed curriculum is taught;
>
> 2) evolution is a central, unifying concept of the District's prescribed biology curriculum;
>
> 3) the District has the managerial right to assign teachers to teaching positions according to licensure;
>
> 4) positions other than biology, for which he [Plaintiff] is qualified, are available within the district.

(Freund memo. of April 29, 1998). Ms. Freund did not mention any religious concerns in this memo or even any concerns that Plaintiff had some sort of "conflict" between his beliefs and evolution.

Plaintiff argues that Principal Johnson did not make the decision to reassign Plaintiff until after reading the position paper. In his deposition, Principal Johnson admitted that he made the decision after the position paper and that he had

previously had an open mind on the question of whether Plaintiff would continue on as a biology teacher in the 1998-1999 academic year. Principal Johnson stated that he and the others at the April 7th meeting were concerned about the extent to which Plaintiff would teach about the possible holes in the theory of evolution, at the expense of "diluting the concept itself." (Johnson depo., p. 33). Principal Johnson asserted concern that "a cornerstone"/"basic concept" of biology would be diluted and that students would "lose the gist" of the theory. (Id. at 34). Principal Johnson stated that he was concerned with how Plaintiff would balance teaching evolution with his "hobby" of investigating the weaknesses of evolution. (Id. at 36). For that reason, Principal Johnson requested that Plaintiff do the position paper.

Plaintiff appealed his reassignment to Superintendent Dixon, and the two met on May 5, 1998. Superintendent Dixon affirmed Principal Johnson's decision and wrote Plaintiff a letter, dated May 14, 1998, explaining his decision to affirm. In the letter, Superintendent Dixon admitted, as he also did in his deposition, that Plaintiff had avowed that he could teach the curriculum. Superintendent Dixon then referred to Plaintiff continuing "to justify why it is appropriate not to follow the curriculum by pointing out the 'discrepancies' that you believe to exist." According to Superintendent Dixon, Plaintiffs explanations compelled him to believe that Plaintiff differed fundamentally with the "commonly held principles of the curriculum as outlined." Superintendent Dixon continued that Plaintiff had made it clear that he could not teach the curriculum and that Plaintiff proposed to use the curriculum as a basis for discussing his disagreement with the curriculum and why the curriculum was incorrect. Superintendent Dixon concluded by stating that Plaintiffs approach could not be described as teaching the approved curriculum. Superintendent Dixon made no reference to religion or a conflict of beliefs in the letter.

In his memorandum in opposition to summary judgment, Plaintiff asserts that Superintendent Dixon discussed a "conflict" with Plaintiff that would prevent him

from teaching biology and that Superintendent Dixon concluded that Plaintiffs wish to present criticisms of evolution was connected to Plaintiffs religious beliefs. In his deposition, Superintendent Dixon admitted that, during their May 5th meeting, he was trying to determine if Plaintiff had a conflict with the curriculum. (Dixon depo., p. 29). In response to the question of whether it occurred to him that Plaintiffs views were related to his religious beliefs, Superintendent Dixon stated, "It could very well be, but that's not my issue." (Id. at 33). Superintendent Dixon stated that Plaintiff was always the person who brought up his religious nature. Superintendent Dixon disputed that Plaintiff said that he [Plaintiff] was a religious person and had trouble with evolution because of that. (Id.). Rather, Superintendent Dixon remembered Plaintiff saying that he had done a lot of study "under this topic" and that he wanted to "bring those things in" and use them in class as part of the discussion of evolution. (Id.).

Plaintiff asserted in his deposition that Mr. Covert, a school board member, told Plaintiff that Ms. Freund had visited Mr. Covert and discussed Plaintiffs reassignment. Ms. Freund ostensibly told Mr. Covet that Plaintiff was being reassigned because he had an internal conflict about teaching religion because of his beliefs in God. (LeVake depo., p. 162). Plaintiff was not present at this meeting between Ms. Freund and Mr. Covert to hear what exactly was said. In the parts of Mr. Covert's deposition that have been submitted to the Court, Mr. Covert did not say that Ms. Freund told him that Plaintiff's difficulties with the curriculum stemmed from religious beliefs. For her part, Ms. Freund denied telling Mr. Covert that Plaintiff had a conflict between teaching evolution and his religious beliefs. (Freund depo., p. 80). Ms. Freund admitted telling Mr. Covert that Plaintiff had a "deep conflict" and "struggles with the curriculum." (Id.). Ms. Freund stated that she told Mr. Covert that Plaintiff had strong reservations about evolution. (Id.).

Plaintiff has not suffered any reduction in salary or benefits, or any demotion in seniority at Faribault High School,

following his reassignment to teaching 9th grade science. Plaintiff has suffered no monetary loss or loss of earning capacity. Plaintiff has not sought any medical or psychological treatment for problems stemming from the reassignment. Plaintiff continues to attend the same church as he attended before the reassignment. Plaintiffs main motivation is to recover his job as a biology teacher.

Plaintiff has since filed a lawsuit against Defendants. The Complaint is dated May 24,1999. Plaintiff is suing Defendants under 42 U.S.C. §1983, alleging violations of the Free Exercise of Religion Clause and Free Speech Clause of the First Amendment to the United States Constitution. Plaintiff also alleges a violation of his academic freedom as a §1983 cause of action. Plaintiff alleges a violation of the Establishment Clause of the First Amendment. Plaintiff alleges that Defendants denied him due process under the federal and state constitutions. Plaintiff further alleges violation of his free speech right under the Minnesota State Constitution and violation of his right to freedom of conscience guaranteed by the Minnesota State Constitution.

Plaintiff requested the following relief in his Complaint:

1. A declaratory judgment that the District's policy of excluding from biology teaching positions persons whose religious beliefs conflict with acceptance of evolution as an unquestionable fact, to be unconstitutional and illegal under both the United States and Minnesota Constitutions.

2. A declaratory judgment that the action of removing Plaintiff from his biology teaching position was illegal and unconstitutional.

3. A Court Order that Defendants restore Plaintiff to his biology teaching position.

4. Compensatory damages in excess of $50,000.

5. Reasonable costs in this action.

Cable News Network ("CNN") interviewed Plaintiff as part of a segment entitled "In the Beginning" that aired on March 12, 2000. This was after Plaintiffs reassignment and after Plaintiff commenced his lawsuit. The segment dealt with the ongoing debate over evolution and the criticisms of evolutionary theory. In the interview, Plaintiff asserted that he was not willing to teach evolution as a fact but was willing to teach it critically and to take a look at both sides of the issue. Ultimately, this video segment has little evidentiary value because it was created and aired almost two years after Plaintiffs reassignment and thus does not address the main issue in this case. That issue is whether Defendants, when making the decision to reassign Plaintiff, violated Plaintiffs constitutional rights by taking improper considerations into account.

ANALYSIS

I. Summary Judgment Standard

A party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that [the] party is entitled to judgment as a matter of law." Minn.R.Civ.Proc. 56.03. The moving party carries the burden of persuasion. Ahlm v. Rooney, 143 N.W.2d 65,68 (Minn. 1966). The Court views the evidence in the light most favorable to the nonmoving party. Grondahl v. Bulluck, 318 N.W.2d 240,242 (Minn. 1982); Valletta v. Reckfidler, 355 N.W.2d 314, 316-17 (Minn.Ct.App. 1984).

When the moving party makes out the prima facie case, the burden of producing facts that raise a genuine issue shifts to the opposing party. Thiel v. Stich, 425 N. W .2d 580,583 (Minn. 1988)(citing Celotex Corn. v. Catrett, 477

U.S. 317,106 S.Ct. 2548, 91 L.Ed.2d 265 (1986)). The nonmoving party may not rest upon mere averments or denials of the moving party's pleading. Minn.R.Civ.Proc. 56.05. The nonmoving party may also not rely on mere general statements of fact or conclusory allegations as to right to trial. Phillips-Klein Companies, Inc. v. Tiffany Partnership, 474 N. W .2d 370, 373 (Minn.Ct.App. 1991). It is also not enough for the party resisting summary judgment to, "simply show that there is some metaphysical doubt as to the material facts." Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn.Ct.App. 1989). The nonmoving party must demonstrate, at the time the motion is made, specific facts in existence which create a genuine issue for trial. Tiffany Partnership, 474 N.W.2d at 373, Minn.R.Civ.Proc. 56.05. Hearsay is inadmissible evidence and must be disregarded on a motion for summary judgment. Blackwell v. Eckman, 410 N.W.2d 390,391 (Minn.Ct.App. 1987).

II. Civil Rights Actions

42 U.S.C. 1983 provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

Two elements are necessary for recovery under 1983: a plaintiff must prove that defendant has deprived him of a right secured by the Constitution and laws of the United States, and that defendant deprived him of this right under color of law. Adickes v. S.H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598, 26 L.Ed.2d 142 (1970). Defendants' reassignment of Plaintiff was an act done under color of Minnesota law. See Keckeisen

v. Independent School Dist., 509 F.2d 1062 (8th Cir. (Minn.) 1975). The Court now turns to analyze whether Defendants violated any of Plaintiffs' constitutional rights.

III. Free Exercise Claim

The First Amendment to the United States Constitution provides that:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise therof; or abridging the freedom of speech, or of the press; or the right or the people peaceably to assemble, and to petition the Government for a redress of grievances.

The First Amendment applies to actions by States and their subdivisions via the Fourteenth Amendment to the United States Constitution. The prohibition of the First Amendment against laws respecting an establishment of religion or prohibiting the free exercise thereof mandates governmental neutrality between one religion and another religion, and between religion and nonreligion. Epperson v. Arkansas, 393 U.S. 97,104; 89 S.Ct. 266, 21 L.Ed.2d 228 (1968).

In the instant case, Plaintiff continues to practice his religion of choice and to belong to his religion of choice. Plaintiff makes no claim that Defendants presented him with some sort of quid pro quo whereby he was to alter his religious practices or to limit expression of his religious beliefs in order to retain the biology teaching position. Rather, Plaintiffs claim boils down to an assertion that Defendants were aware of his religious beliefs and improperly considered his religious beliefs to reach a conclusion that he had a conflict between his beliefs and the theory of evolution that would prevent him from being an effective biology teacher. Therefore, asserts Plaintiff, Defendants penalized him for his religious beliefs because of their assumptions about those beliefs. Defendants deny this and assert that they reassigned Plaintiff solely because

it became apparent to them that Plaintiff would not teach the District's established biology curriculum.[1]

The fact that Plaintiffs contract with the District provides that he may be reassigned to whatever position for which he holds licensure does not by itself vitiate his free exercise claim. Plaintiff's analogy to a black at-will employee who is fired for racial considerations is apt. However, the black employee would still have the burden of bringing forth specific facts to establish his racial discrimination claim. Plaintiff here has the burden of bringing forth specific facts that create a genuine issue of fact that Defendants may have considered Plaintiffs religious beliefs when making their decision to reassign him.

Plaintiff has not come forth with any facts demonstrating a genuine issue. In his deposition, Plaintiff stated that he had never told Ms. Freund or Principal Johnson what his specific beliefs were before the April 1st meeting. Regarding Ms. Freund's queries about whether he mentioned God or the Bible in class and whether his students knew he was Christian, Plaintiff admitted to understanding that Ms. Freund was merely ensuring that Plaintiff was not discussing religion in the classroom. Ms. Freund's memo to the school board members contained no references to Plaintiffs religious beliefs and reported that Plaintiff did not regard evolution to be a viable scientific concept. Plaintiff's statement that Mr.

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[1]Plaintiff has devoted a fair amount of energy to arguing that Defendants' actions did not just concern the past, that is, his alleged failure to teach the biology curriculum in the 1997-1998 academic year, but that Defendants also based their decision to reassign upon their concerns about what Plaintiff would do in the future. That may well be true, and is not dispositive in any event. The key issue is not whether Defendants were thinking about probJems in the past or were concerned with potential problems in the future, or some combination. The key issue is whether Defendants made their reassignment decision based upon constitutionally invalid considerations.

Covert told him that Ms. Freund had referred to Plaintiff having a conflict because of his belief in God may appear significant at first blush. However, in Mr. Covert's deposition, or at least in the pages submitted by Plaintiff to the Court, Mr. Covert makes no reference to Ms. Freund telling him that Plaintiff's religious beliefs were causing a conflict. Therefore, this information exists only in Plaintiffs deposition as a hearsay statement and is inadmissible as evidence to raise a fact issue. See Blackwell, 410 N.W.2d at 391. Finally, Superintendent Dixon, discussing his May 5th meeting with Plaintiff in his deposition, agreed that Plaintiff's views may have been linked to his religious beliefs and then said, "but that's not my issue." (Dixon depo., p. 33). This is not an admission on Superintendent Dixon's part that Plaintiff's religious beliefs were considered in the reassignment decision. It is simply an after the fact reflection that Plaintiff's difficulties with the curriculum may have been connected to his religious views.

The pieces of evidence (i.e. deposition testimony, documents) to which Plaintiff points as support for his position actually support Defendants' position that they based Plaintiff's reassignment upon doubts concerning Plaintiff's efficacy as a biology teacher. Superintendent Dixon referred in his letter to Plaintiff to statements by Plaintiff in his position paper characterizing evolution as "impossible" and stating that he would teach evolution, but with an "honest look" at the difficulties and inconsistencies. Superintendent Dixon asserted that Plaintiff had made it clear that he could not teach the curriculum. Principal Johnson, discussing the April 7th meeting, stated in his deposition that Defendants were concerned that Plaintiff would overemphasize the difficulties with the theory of evolution at the expense of allowing the theory itself to slip into obscurity. Ms. Freund's memo to the school board members made no reference to religious views but justified the decision to reassign Defendant based on fears that he would not properly teach the biology curriculum. Plaintiff has failed to adduce any specific disputed facts to justify a finding that Defendants reassigned him based, even

in part, upon their attitudes toward his religious beliefs and their preconceptions of how those beliefs affected him as a biology teacher. Without any facts demonstrating religious factors in Defendants' decision-making, Plaintiff cannot make out a violation of the Free Exercise Clause in this case, and Defendants are entitled to judgment as a matter of law on that claim.

The case of Peterson v. Minidoka County School District No.331, 132 F .3d 1258 (9th Cir. 1997) is not apposite. In that case, a public elementary school principal announced that he would be withdrawing his children from the public schools and would homeschool them so that their education would receive "an aspect of God being the creator." Peterson, 132 F.3d at 1262. The Board of Trustees exercised its right to reassign and removed Peterson, the principal, from his post, citing concerns about the effect on morale caused by a public school principal removing his children from the public schools. The Federal District Court for Idaho granted Peterson summary judgment on, inter alia, his claim that his freedom of religion had been violated. The Ninth Circuit affirmed. Peterson is not on point in the instant case for one major reason. Peterson implicated the fundamental right of parents, discussed by the United States Supreme Court in Wisconsin v .Yoder and Pierce v. Society of Sisters, to direct the education and rearing of their children. Peterson had exercised his right to give his children a religious education. The instant case does not involve an exercise by Plaintiff of a religious right concerning his own children, but rather just Plaintiff's disagreement with the curriculum, which he was charged to teach to other people's children.

IV. Establishment Clause

The United States Supreme Court has devised a three-prong test to determine whether governmental action comports with the Establishment Clause of the First Amendment. To withstand an Establishment Clause challenge, a state statute, policy or action: 1) must have a secular purpose; 2) must, as

its primary effect, neither advance nor inhibit religion; and 3) must not foster an excessive government entanglement with religion. Lemon v. Kurtzman, 403 U.S. 602,612-13,91 S.Ct. 2105, 2111 (1971). The theory of evolution is not a religion and requiring it to be taught as part of a school curriculum does not constitute an establishment of religion. See Peloza v. Capistrano Unified School Dist., 37 F.3d 517 (9th Cir. 1994). Plaintiffs theory is essentially that Defendants denied him the biology post based upon his adherence to certain religious beliefs and thereby favored nonreligion over religion. The State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus preferring those who believe in no religion over those who do believe. School District of Abbington ton Township v. Schemp,374 U.S. 203,225; 83 S.Ct. 1560; 10 L.Ed.2d 844 (1963).

Plaintiff's Establishment Clause claim suffers from the same infirmity that afflicts his Free Exercise claim. Plaintiff has not brought forth disputed material facts that could establish that his reassignment was religiously motivated. The question to which the Lemon test must be applied then becomes one of whether Defendants created an establishment of religion by reassigning Plaintiff due to concerns about his ability to teach the curriculum. That was a secular purpose and thus met the first prong of Lemon. Second, Plaintiff's reassignment did not have the primary effect of advancing or inhibiting religion; as noted, teaching evolution is not a religious activity. Third, Plaintiff's reassignment did not excessively entangle the District with religion. The reassignment resulted simply in a personnel shift at the high school. Plaintiffs Establishment Clause claim fails, and Defendants are entitled to judgment as a matter of law.

V. Freedom of Conscience

The Court shifts here from analyzing the federal constitutional claims to analyze the Freedom of Conscience Clause in the state constitution because that clause deals with

religion and is thus logically placed in sequence with the analysis of the federal religion clauses. Minn. Const. art. I, Sec. 16 provides:

> The right of every man to worship p God according to the dictates of his conscience shall never be infringed; nor shall any man be compelled to attend, erect or support any place of worship, or to maintain any religious or ecclesiastical ministry, against his consent; nor shall any control of or interference with the rights of conscience be permitted, or any preference given by law to any religious establishment or mode of worship; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness or justify practices inconsistent with the peace or safety of the state....

This language is broader and more emphatic than the religion clauses of the First Amendment to the United States Constitution. Murphy v. Murphy, 574 N. W .2d 77, 81 (Minn.Ct.App. 1998). While the First Amendment limits government action at the point of prohibiting the exercise of religion, section 16 precludes even an infringement on or interference with religious freedom. When reviewing a party's claim under the Freedom of Conscience Clause, courts ask whether: 1) the objector's belief is sincerely held; 2) the state regulation burdens the exercise of religious beliefs; 3) the state interest in the regulation is overriding or compelling; and 4) the state regulation uses the least restrictive means for effectuating its compelling interest. Judicial intervention into the determination and interpretation of religious beliefs warrants caution, which favors recognizing an asserted religious belief as sincere. See Hill-Murray Federation of Teachers, St. Paul, Minn. v. Hill-Murray High School, 487 N. W.2d 857,865 (Minn. 1992).

In the instant case, the Court will assume that Plaintiff s religious beliefs, whatever they may be exactly, are indeed sincere. Plaintiff then runs into difficulties under the second

prong of the test. No matter how generous the law, the presence of material facts in dispute is still required to make out a claim. Plaintiff does not assert that his reassignment has affected his church attendance, personal religious practices or ability to discuss religious topics in any way. Plaintiff has failed to come forward with specific facts supporting his assertion that his religious beliefs were a factor in losing his biology teaching position. Therefore, the second prong of the test is unfulfilled. The District has a compelling interest in education, which is its specific duty. Because no burden on religion has been demonstrated, there is no need to ask whether Plaintiff s reassignment was the least restrictive means for the District to assuage its concerns about the biology curriculum. Defendants are entitled to judgment as a matter of law on this claim.

VI. Freedom of Speech

Plaintiff alleges that Defendants violated his First Amendment right to free speech by removing him from the biology position based on his views on evolution and his past expression of those views. The question of whether speech of a government employee is constitutionally protected expression entails striking a balance between the interests of the teacher, as a citizen, in commenting upon matters of public concern ant the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees. Pickering v. Board of Education, 391 U.S. 563, 568; 88 S.Ct. 1731 ; 20 L.Ed.2d 811 (1968). Plaintiff's situation differs greatly from that of the public school teacher in Pickering. In that case, a teacher was dismissed after writing a letter to a local newspaper criticizing the way in the board of education and superintendent of schools had handled past proposals to raise new revenue for the schools. In the instant case, Plaintiff asserts a free speech right to teach the criticisms of evolution in the biology classroom. Plaintiffs position is wrong.

The rights of free speech and assembly, while

fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. Cox v. Louisiana, 379 U.S. 536,554; 85 S.Ct. 453; 13 L.Ed.2d 471 (1965). In particular, a school classroom is a nonpublic forum and, like the private owner of property, the District may legally preserve the property [the classroom] under its control for the use to which it is dedicated. See Lamb's Chapel v. Center Moriches Union Free School Dist., 508 U.S. 384,391; 113 S.Ct. 2141; 124 L.Ed.2d 352 (1993). Plaintiff's classroom at the high school is a nonpublic forum, and the District has the right to limit the speech in that classroom to the teaching of the designated curriculum. The District bears the responsibility of assuring "that participants learn whatever lessons the activity is designed to teach." Miles v. Denver Public Schools, 944 F.2d 773,777 (10th Cir. 1991)(quoting Hazelwood School District v. Kuhlmeier, 484 U.S. 260, 108 S.Ct. 562,98 L.Ed.2d 592 (1988)). In the District's 10th grade biology curriculum, one of those lessons is evolution. When Plaintiff is standing before his students in the classroom, he is not in the position of a citizen on the public square with a right freely to express his opinion as he sees fit. Rather, he is acting as an employee of the school charged with teaching the prescribed curriculum and is in a location which the District has reserved for the purpose of teaching students the prescribed curriculum. To rule that Plaintiff has a free speech right to teach the curriculum as he sees fit would be literally to make a federal case out of every dispute between a teacher and his superiors. This the Court will not do. Defendants are entitled to judgment as a matter of law on this claim.

Plaintiff also alleges that Defendants violated his state free speech rights under Article I, Section 3 of the Minnesota Constitution. The Minnesota Supreme Court has ruled that Article I, Section 3 does not offer more expansive protection of speech than does the First Amendment of the federal constitution. See State v. Wicklund, 589 N.W.2d 793, 799 (Minn. 1999). The federal and state provisions are therefore coextensive, and the foregoing First Amendment analysis

applies with equal force to the state law claim. Defendants are entitled to judgment as a matter of law on this claim as well.

VII. Academic Freedom

Plaintiff's academic freedom claim has essentially the same flaws as his free speech claim. Though academic freedom is not one of the enumerated rights of the First Amendment, the preservation of the classroom as a "marketplace of ideas" is one of the safeguarded rights. Healy v. James, 408 U.S. 169,180-181; 92 S.Ct. 2338; 33 L.Ed.2d 266 (1972)(quoted in Clark v. Holmes, 474 F.2d 928,931 (7th Cir. 1972)). However, academic freedom is not a license for uncontrolled expression at variance with established curricular content. Clark, 474 F.2d at 931 (instructor had no constitutional right to override the wishes and judgment of his superiors and fellow faculty members as to content of required health course). Teachers have no unlimited liberty as to the structure and content of courses at the secondary level. Adams v. Campbell City School, 511 F.2d 1242,1247 (10th Cir. 1975)(teacher terminated for, inter alia, discussing current events in class rather than devoting full attention to English, the class she was assigned to teach). Plaintiff in the instant case has no constitutional right to teach his proposed criticisms of evolutionary theory, though they may be scientifically meritorious. The District has the right to control the science curriculum, and Defendants are entitled to judgment as a matter of law on this claim.

VIII. Due Process

The Fifth Amendment to the United States Constitution provides that no person shall be deprived of life, liberty, or property without due process of law. As a tenured public school teacher, Plaintiff does have a property interest in his employment at the high school. However, it is undisputed that Plaintiff still has his employment at the high school. Plaintiff has suffered no loss of pay, earning capacity, benefits

or seniority. He was merely shifted to a different teaching post, an event which his contract with the District contemplates and expressly allows. Plaintiff has suffered no property deprivation and has no basis to allege a violation of due process with respect to any property interest.

A public employee also has a liberty interest in his employment, which is implicated when a public employer inflicts damage to the employee's reputation, thus impairing his future employment opportunities. See Siegert v. Gilley, 500 U.S. 226, 233; 111 S.Ct. 1789; 114 L.Ed.2d 277 (1991). Plaintiff is not alleging any defamation on Defendants' part and admits that there is nothing demeaning about teaching ninth graders rather than tenth graders. In any event, to rise to the level of a constitutional infraction, the defamation must be accompanied by termination or failure to rehire. Id. No such thing has happened in the instant case, and Plaintiff has no claim for violation of a liberty interest. Defendants are entitled to judgment as a matter of law on the federal due process claim.

Like the Fifth Amendment, the Minnesota Constitution's Article I, Section 7 forbids the deprivation of property or liberty without due process of law. The Court is unaware of any law that interprets the relevant language of Article I, Section 7 more broadly than the Due Process Clause of the Fifth Amendment. It is a significant undertaking for a state court to hold that a state constitution offers broader protection than similar federal provisions and should be done only if there is a sound reason to do so. Wicklund, 589 N.W.2d at 799. Plaintiff has not suggested any broader interpretation of the state constitution, and the Court will not create one. Defendants are entitled to judgment as a matter of law on the state due process claim.

IX. Qualified Immunity, Damages and District Liability

Because the Court has granted summary judgment as to all of Plaintiff's claims, it is unnecessary to consider the

applicability of the qualified immunity defense. The granting of summary judgment as to all claims also renders unnecessary any need to consider damages and whether there is any reason for a jury trial. There is also no need to consider whether the actions of Superintendent Dixon can bind the District for purposes of § 1983 liability under Pembauer v. Cincinnati, 475 U.S. 469; 106 S.Ct. 1292; 89 L.Ed.2d 452 (1986). Without liability on the part of the individual defendants, no liability can adhere to the District on any of the claims. Summary judgment is granted as to all claims, and Plaintiffs suit is dismissed with prejudice.

Dated: June 20, 2000

/s/ Bernard E. Borene
Bernard E. Borene
Judge of District Court

APPENDIX D

STATE OF MINNESOTA
RICE COUNTY

DISTRICT COURT
THIRD JUDICIAL DISTRICT
CASE TYPE: OTHER CIVIL

RODNEY LEVAKE Plaintiff, v. INDEPENDENT SCHOOL DISTRICT #656, et. al. Defendants.	)	CIVIL FILE NO. CX-99-793

AFFIDAVIT OF RODNEY LEVAKE

Rodney LeVake, being duly sworn, deposes and says:

1. I am the plaintiff in this case and make this affidavit from personal knowledge. The purpose of this affidavit is to address some of the misrepresentations and distortions of facts which the defendants have put before this Court.

2. To begin with, I never wished, nor did I ever attempt to introduce religion or religious concepts or beliefs into my Biology class. I made it clear from the start that I had no interest in teaching "creationism," or "scientific creationism" in my class.

3. All I ever wanted to do was to teach good science. I have a master's degree in Biology Education from Mankato State. I am aware that there are numerous scientists, many of them ardent evolutionists, who have criticized part

or all of Darwin's theory of evolution on purely scientific grounds. I think Biology students are entitled to know this. I know of no legitimate educational or other reason to hide such knowledge from my students.

4. The '97-'98 academic year was my first year teaching Biology. Before the year began I discussed the course with Virgil Luehrs, the retiring teacher whose position I would be filling. Among the many aspects of the course we talked about, I remember asking Virgil how he handled evolution. Virgil told me that he always read to the students the part of the textbook, Section 10.1, which says there are "at least three ways life could have begun: extraterrestrial origins, creation and origin from nonliving matter." Virgil also told me that he did not spend much time on evolution.

5. I remember telling my class on the first day of the school year that they did not have to believe in evolution to do well in my Biology class. I did this because I knew there were some students in my class who come from families where accepting evolution as an unquestionable fact would be a real conflict. I wanted to reassure those students that they could still do well in my class.

6. At no time during the meetings which were held in April of 1998 with various administrators and teachers was the question of what I had or had not taught that year discussed. All of these discussions centered around what my opinions were about evolution and how I expected to teach it in the future.

7. I was shocked when Dave Johnson and Cheryl Freund told me in late April or early May that I was not going to be allowed to teach Biology. This was the first indication I had ever had that my job as a Biology teacher was on the line.

8. Neither Johnson nor Freund ever told me that I was being reassigned because I had failed to cover Chapter

9 or any other part of the textbook. In fact, if that was their real concern they could have ordered me to cover it that year since there was still at least a month left in the school year.

9. When I met with Dr. Dixon there was no mention of any failure to cover any part of the Biology curriculum. The entire discussion centered around my views on evolution. Dr. Dixon expressed his opinion that I had some kind of a deep conflict that would prevent me from teaching Biology.

10. I have consistently denied to school officials and I continue to deny that I have any such conflict.

11. I have consistently assured school officials that I can and would teach the theory of evolution. I do not believe that I must accept it as an unquestionable fact in order to teach it. I do not believe that I must or should treat it as some sort of self-evident proposition which is beyond questioning or even examining.

12. I never told anyone or otherwise indicated that I intended to spend "the whole year" or any extended period of time criticizing or debating evolution. I was asked to write my views on evolution and give officials a general idea of how I would handle it in class. My position paper was never intended to be an outline of what I intended to teach my class but, rather, a presentation of what I questioned about the scientific basis of the theory of evolution. I thought the paper was being asked for to clarify my views as part of a continuing, open dialogue with my peers.

13. I never told school administrators that I had a religious or philosophical conflict with teaching evolution. My non-acceptance of parts of the evolutionary theory is based on science.

14. It was school administrators who brought up the question of religion or philosophy; first, Ms. Freund in

the meeting on April 1, 1998; then, Dr. Dixon in my meeting with him in which he talked about me having some sort of philosophical conflict.

15. I never told Dr. Dixon that I was religious or that my religion in any way conflicted with me teaching about evolution.

16. I had no idea that I could lose my job for reading books published by religious organizations. I had no idea that by sharing with my colleagues scientific criticisms of evolution distributed by religious groups I was jeopardizing my position.

17. It is not true that the source of my information regarding the weaknesses and inconsistencies of evolution is religious oriented literature. In my position paper I referred to three secular, nonreligious works as sources and support for my position. The primary source was a book called Evolution: A Theory In Crisis, by Michael Denton. Denton is a molecular biologist and is definitely not a creationist. Denton's book makes reference to hundreds of nonreligious, scientific sources containing extensive criticisms of evolutionary theory.

18. It is true that I did not spend much time on evolution during the one year I was allowed to teach Biology. I have never denied this. I did, however, spend a class on natural selection and I did cover the one and only lab activity dealing with evolution.

19. It is true that I did not cover Chapters 10 and 11 of the textbook. Neither did my fellow Biology teacher, Bob Koehler. Neither did my predecessor, Virgil Luehrs. In fact, according to Mr. Luehrs' lesson plan book, he spent only two classes on evolution, one of which was spent watching a video.

20. It is very misleading to say that I used a book

called "The Evolution of a Creationist" in my class. I did use some drawings from that book as overheards, and did discuss some of the amazing anatomical features of some animals mentioned in that book. I omitted all extraneous references from the overheard I took from the book. (See attached Exhibit A, compare with defendants' Exhibit 18).

21. Finally, with reference to the Affidavit of Mr. Benbrooks and Ms. Ellison that are attached to defendants' brief, I believe their recollections of what I said are not entirely accurate. I certainly never told my class that I had strong beliefs that conflicted with evolution and that if I was not allowed to cover the criticisms and weaknesses of the theory, I was not going to cover it at all. I know this to be so because at the time I am alleged to have said this no issue had yet arisen about me teaching evolution and I was far more concerned in just being able to do my job than in worrying about the criticisms and weaknesses of the theory of evolution.

As for not covering certain chapters, it is not unlikely I told my class we would not cover at least two of the three chapters on evolution since those were optional chapters, both my colleague and predecessor skipped them, and we were operating under a school schedule shortened by a month.

FURTHER AFFIANT SAYETH NOT.

/s/ Rodney LeVake
RODNEY LEVAKE

Subscribed and sworn to before me
this _____ day of April, 2000.

_____
Notary Public

_____
Commission

APPENDIX E

POSITION PAPER

It is a difficult task to concisely document in an understandable way, the high points of the creation/evolution debate. In the interest of time, I hope to point out only the major points of contention I see and will not attempt an exhaustive review worthy of publication. I will also forego any specific references to sources that I have gained information from. If you care for these references privately I can give them to you. Thank you before hand for having an open mind on this issue.

It seems appropriate to start with general ideas and follow with some examples. Perhaps a few definitions would be in order. Personally, I define evolution in the broadest terms possible often referred to as macroevolution; or the process that caused life to arise from a non-living ancient pond into the bacterial, plant and animal organisms that we see today. This evolutionary theme also includes the recurrent ingredients of billions of years, mutations, chance (with absolutely no design), and the mechanism of natural selection to insure the survival of the fittest.

The terms science, biology and theory should also be defined. The definition our Biology text (Biology, Visualizing Life) uses for science will suffice for now. As stated on page five; "Science is a way of investigating the world, of observing nature in order to form general rules about what causes things to happen." Biology, it continues, "is the study of living things, of ourselves and the living world." Theory is defined as "a collection of related hypotheses that have been tested and supported."

Technically, under these three definitions, it is apparent that neither evolution nor creation can be considered a science (Biology), because neither is observable at the present. (No person was there to witness either one.) It could be argued that both don't even qualify as a theory since each is impossible to test. Both ideas are actually opposing philosophies that have been developed by people who see the world and

themselves from different standpoints. In addition, both sides have exactly the same scientific facts and observations to analyze, but have interpreted the data differently. The truth of the matter is that proponents of either interpretation must accept it as a matter of faith.

Since the topic of this position paper is my concern with evolution, I will not spend time on what I see as supporting evidence for a creationist point of view. However, that discussion is an interesting one that I would welcome at a later date and find it extremely enlightening.

The theory of evolution, as it is referred to in our text, can be challenged on two fronts:

1. The process of evolution itself is not only impossible from a biochemical, anatomical, and physiological standpoint, but the theory of evolution has no evidence to show that it actually occurred.

2. The complexity of life that we see around us is a testimony that evolution, as it is currently handled in our text, is impossible.

Probably the most embarrassing fact for supporters of evolution is the amazing lack of transitional forms in the fossil record. There has never been a creature discovered that could be considered a logical intermediate of any two major classes of animals or plants. Archaeopteryx was considered by many to be a link between reptile and bird, but has recently been questioned. There are millions of fossils that have been found in the 100+ years of paleontology and we would reasonably expect to find an equal number of transitional forms. The truth is, as time goes on, the different groupings of creatures have become even more isolated from one another. Even Darwin agreed that "the distinctions of specific forms and their not being blended together by innumerable transitional links is a very obvious difficulty." To add to this dilemma, the fossils that have been found to date, that still have living individuals, are nearly identical to how the living creatures appear in life today. Very little change, if any, has occurred. Polystrata fossils (fossils that

cross several million years of strata) also complicate this matter. (There are books written entirely about this issue.) The process of finding the age of a particular fossil can be questioned as well. The whole area of radiometric dating is based on the unfounded assumption that the quantities of elements being researched (ex: C14) have been constant over time and that they have decayed at the same rate. The existence of materials receiving multiple dates, along with the discovery of large areas of older strata that have been found over younger strata, place radiometric dating in doubt.

Another cornerstone of the theory of evolution is the speculation of beneficial mutations occurring over time. However, mutations generally have a negative impact on the creature that comes into existence with it. It is equally hard to see how the mutation, for example, changing a leg into a wing, could be beneficial for the creature who possessed it. Flight is more than the wing, and walking more than the leg. Any supposed life form that had the wing and not the necessary anatomical (respiratory, circulatory, etc.) changes to go with it, would certainly die. The giraffe would be hard pressed to have evolved its increasingly long neck if it were not associated with the necessary changes in the circulatory system to push the blood up that far. (2 1/2 foot long heart, arterial and venous valves, auxiliary brain sinuses, etc.)

According to our book on page 113, spontaneous generation (life arising from non-living things) was finally disproved in the 1860's by Louis Pasteur. However, on page 199, our book sees no inconsistency in stating that "most scientists think that life arose on Earth from inanimate matter." (wow)

The Second Law of Thermodynamics, said to be a universal law, states that over time, systems tend to move from order to disorder increasing in entropy (chaos). The theory of evolution is in clear violation of this law. Evolution, in effect, states the opposite and that the first cell arose from chemical chaos and subsequently all other living creatures we see at present.

No one has ever seen evolution occurring. Even in

thousands of generations of fruit flies that have been experimented with, the fruit fly has never given rise to anything but a fruit fly; even though hundreds of non-beneficial mutations have been introduced.

Natural selection, or microevolution, has been claimed as the primary mechanism for the theory of evolution. Our text defines it as the "process by which organisms best suited to their environmental conditions are most likely to survive and reproduce." There is a great deal of evidence for natural selection when viewing the genera of life around us and therefore I would teach it with no reservations. Examples are numerous and would include the Galapagos finches, the genusCanis, and the peppered moths of England. However, as for being a mechanism for the theory of evolution, the recent literature doesn't support this conclusion when macroevolution is considered.

There are additional questions with the theory of evolution that time doesn't allow me to discuss:

* Homology is the study of similar organs/structures on different creatures that have the same function. It has been discovered that they arise from different locations on the DNA sequence.

* What are the chances of the 20 amino acids used in living things, aligning themselves into strings of 100's (a protein) without any "plan" (DNA) to do so?

* How could flight evolve 4 separate times? (bats, birds, insects, and flying reptiles which are now extinct)

* How can physical changes on the outside of a creature be connected with a myriad of internal anatomical changes that would have had to evolve simultaneously?

* What about the concept of irreducible complexity in cellular functions? (Behe)

* How could the intricacies of all five kingdoms evolve perfectly dovetailed together in the most minute way?

(termite/protozoa, cow/bacteria etc.)

* What is the mechanism that enabled plants to give off the O2 that animals use and take in the C02 that animals give off? Two vastly separate kingdoms that rely on each other for survival.

The second major unanswered question I have in regard to evolution, is the absence of an explanation for the incredible complexity we see around us. I'm sure that as scientists yourself, you have seen many examples of complexity that science presently has no explanation for. A very incomplete list follows.

* The structure of the microscopic bacterial flagella

* The chemical processes of photosynthesis and cellular respiration

* The gazelle's internal brain "radiator"

* The woodpecker's tongue and shock absorber

* The egg shell

* The circulatory changes in placental mammals needed at birth to live

* The underwater nipples of female whales and the related nursing process

* The human mind with its billions of connections

* The 3 billion rungs of the human DNA molecule copied completely each time a cell divides; virtually without an error

* 500 million microscopic suction cups on the toe pads of the Gecko Lizard (35,000x) making it possible to climb upside down on the ceiling

* The avian "1-way" respiratory system which is unique

among any other animal's respiratory system

* The complete metamorphosis of a caterpillar to a butterfly

* The migration of the Monarch butterfly to Mexico or the Arctic Tern's flight across the globe

* The process of differentiation from fertilization of the egg to a completely viable seed in plants or an infant in humans

* The earthworm's livelihood

* The life cycle of the deep sea angler fish

* How atoms can make useful molecules, these molecules living cells, and these living cells form systems in viable organisms in a predictable manner again and again from a three billion character code virtually without error

* How the misfolding of a protein molecule can often mean death to its owner

* The cell membrane and the transporting of molecules across it

* The sense of hearing

The list could go on and on. It is no wonder that Darwin himself was bothered by all of these observations when he said "Although the belief that an organ so perfect as the eye could have been formed by natural selection, is enough to stagger any one. I have felt the difficulty far too keenly to be surprised at others hesitating to extend the principle of natural selection to so startling a length." (Denton p. 61) Darwin would be astounded with what has been learned since his time.

Thousands of scientists with advanced credentials have begun to take a second look at what we all were taught in school as "fact." I encourage you to read Michael Denton's

book Evolution: A Theory In Crisis, (1985, Adler & Adler), Phillip E. Johnson's book Darwin on Trial (1991) and Michael Behe's book Darwin's Black Box (1996, Touchstone). Although I have not personally read the last two books listed as of yet, they are nationally acclaimed as critical reviews of the theory of evolution and are on my list of books to read.

With all that said, you can expect from me in class as a Biology teacher to work toward the following goals.

1. Teach real and practical knowledge that my students can use in decisions they make about themselves and their role as an "educated citizen" of this country.

2. Kindle in my students an appreciation for the complexities and subtleties of various forms of life and their systems.

I don't believe an unquestioning faith in the theory of evolution is foundational to the goals I have stated in teaching my students about themselves, their responsibilities, and gaining a sense of awe for what they see around them. I will teach, should the department decide that it is appropriate, the theory of evolution. I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning my class into a religious one. Anything less than this constitutes poor science and that by its very nature science is a questioning discipline. I think that this technique in handling the national debate would keep my students' belief systems intact, whatever they may be, without needlessly insulting what they and their families may believe. A proper religious treatment of this debate should be handled within the students' family and place of worship.

I have been told that as a school district, we would like to be known as a team embracing diversity. It seems that it would be contradictory for our science department to develop a litmus test of belief in evolution as fact in order to teach the subject of Biology. In fact, we could use our differences on this issue as a springboard for a student-led debate on the issue. The benefits of developing critical thinking

skills with our students would be attractive. A public debate between members of our staff would be stimulating as well. It might be an effective means of modeling to our students that people can disagree with one another without resorting to name calling and violence. Instead, we could illustrate that a situation can be handled in a mature and professional manner. A cooperative teaching association could be developed where students attend an informational discussion that supported evolution, and then the next day, attend one that points out the difficulties encountered by the theory of evolution. I suppose even an interdisciplinary effort could address this debate from a historical perspective in Social Studies or use this issue as a theme for a composition in English. The creative ideas that we could employ to help our students develop as critical thinkers would be endless.

In closing, I would like to thank you for this opportunity to explain my concerns with the theory of evolution; and for having an open mind on this issue. I, by no means, claim to know everything about this debate or the complexities of Biology. However, I do feel strongly that this issue cannot be ignored, but instead requires further research and thought. I look forward to discussing this with you personally should you desire to do so.

Sincerely,

Rod LeVake

APPENDIX F

DEPARTMENT OF CHILDREN, FAMILIES, AND LEARNING

CHAPTER 3501 GRADUATION STANDARDS

Minn. R. 3501.0446 (2000)

3501.0446 LEARNING AREA SIX: SCIENTIFIC APPLICATIONS

Subpart 1. High school content standards for learning area six. Specifications for high school content standards in learning area six are under subparts 2 to 6.

Subp. 2. Concepts in biology. A student shall:

A. demonstrate understanding of biological concepts, theories, and principles including cell theory, mechanisms of heredity, biological change over time, the interdependence of organisms, material cycles and energy flow in living systems, the behavior of organisms, and the historical significance of major scientific advances through the investigation and analysis of cells, organisms, and ecosystems;

B. demonstrate understanding:

(1) of how historical and current scientific concepts and knowledge guide scientific inquiries;
(2) that scientific inquiries are performed to test ideas and predictions and to learn about the natural world;
(3) of how the use of various technologies influence the quality of data and the investigation;
(4) of the essential role of mathematical tools and models and how they are essential to scientific inquiry;
(5) of how explanations based on evidence adhere to established criteria including empirical standards, logic, openness to criticism, and reporting of methods and procedures; and
(6) of how traditions govern the conduct of science,

including ethics, peer review, and consensus;

C. design and conduct an experiment to investigate a question and test a hypothesis by:

(1) formulating a question and hypothesis;
(2) designing and conducting an investigation;
(3) recording relevant data;
(4) analyzing data using mathematical methods;
(5) constructing reasonable explanations to answer the question and supporting or refuting a hypothesis;
(6) identifying and considering alternative interpretations of results; and
(7) specifying implications for further investigation;

D. design and conduct one investigation through a problem-based study, service learning project, or field study by identifying scientific issues based on observations and the corresponding scientific concepts; analyzing data to clarify scientific issues or define scientific questions; and comparing results to current models, personal experience, or both; and

E. use scientific evidence to defend or refute an idea in a historical or contemporary context by identifying scientific concepts found in evidence; evaluating the validity of the idea in relationship to scientific information; and analyzing the immediate and long-term impact on the individual, society, or both, in the areas of technology, economics, and the environment.

....

APPENDIX G

COURSE SYLLABUS

BIOLOGY A & B

FARIBAULT SENIOR HIGH SCHOOL

Major Text: TITLE: BIOLOGY, VISUALIZING LIFE

PUBLISHER: HOLT, RINEHART & WINSTON

COPYRIGHT: 1994

AUTHOR: GEORGE B. JOHNSON

Supplementary Materials: Selected articles from newspapers, magazines, journal and monographs are used when timely and appropriate. Filmstrips, films and videos are also included in the course.

Labs: Teacher designed/modified labs appropriate to topics and facilities are included in the course.

Requirements: Regular attendance is expected. Absences will require make-up. Assignments are required and are to be completed by the due date.

Policies: Policies consistent with the School District and Senior High are followed. Alternative course requirements are given on a case by case basis after conferring with the student, parent, department and administration.

Course Content: See attached course description from the registration guide. It must be noted that Biology like other sciences contains material and deals with subjects that are sensitive in nature or may be inconsistent with the values/beliefs of some individuals. Every attempt is made to deal with such material in a sensitive, impartial and open manner.

Below are examples of such topics:
—Dissection of the fetal pig.
—Evolution . . . nature of change.
—Using knowledge to make appropriate predictions in daily living.
—Role of science in society . . . decision making.
—Personal responsibility in disease prevention.
—Using knowledge and inquiry to be a smart consumer.
—Application of new knowledge in reproductive biology.
—Animal rights versus human needs/wants.
—When are we alive/dead?
—Environmental responsibility versus economics.

BIOLOGY (Grades 10-11-12) All Year

Credit: 1 Credit (1/2 Credit per Semester).

Course Description:

Biology should be taken by all students. Biology, along with 9th grade science, gives the student the two science credits needed for graduation. Students taking only onescience class in Senior High School should take Biology as a Junior. Students planning on taking chemistry and physics should take Biology as a sophomore or in summer school. Summer School Biology however, is taught at a faster pace than the year long course, therefore students in summer school should be average or above average ability in order to be successful. Daily media topics such as genetic engineering, gene splicing, micro-organisms, disease, pollution heredity, selective breeding, cells, body chemistry, fitness, growth, reproduction, plants, food and medicine support the importance of taking this course in order to be literate in many aspects of science which are impacting our world today.

The learner will be able to:

1. relate topics studied in Biology to the following themes:

a. Energy and Life. Energy from the sun is passed through all life.

b. Scale and Structure. Livign things are made of atoms organized into cells and increasing levels of complexity.

c. Stability. Living organisms maintain a constant internal balance.

d. Evolution. Natural selection and mutations are constantly causing changes in living things.

e. Patterns of Change. Cells grow and divide and organisms go through development in an orderly way because of instruction in the genetic material, the genes, which are made of DNA.

f. Interacting Systems. Living things interact with each other and their environment in complex and cooperative ways which are often upset by human activities.

2. use most of the following process skills:

observing	analyzing data	relating	identifying
inferring	evaluating	collect data	compare & contrast
design experiments	demonstrate	measure	calculate
classify organize data	hypothesize state problems	predict	model

3. use a variety of scientific instruments correctly and safely.

4. identify characteristics of living things.

5. know that science has limitations in solving society's problems.

6. examine opportunities available in science related careers.

7. identify beneficial and harmful effects of viruses and bacteria.

8. relate the dissection of an organism to human anatomy and physiology.

APPENDIX H

CURRICULUM WRITING PROPOSAL FORM
DISTRICT 656

Name of person requesting project: Robert Koehler & Virgil Luehrs

1. Briefly describe the proposed project.
   We are adopting a new Biology Program and need time to prepare for the implementation in the Fall of 1994.

2. Identify the need for the project.
   We need to determine the scope and sequence that we will be using.
   We need to integrate the new program with the support materials (labs, media, supplies, etc) we are now using.
   We need to prepare a course description for the Registration Guide.
   We will be changing some units from first to second semester and need to plan accordingly.

3. What phase of the district's curriculum review cycle does the project address? Explain.
   Implementation.

4. Outline the project, people involved, timelines, materials needed, etc. as follows:
   DATES AND HOURS OF WORK:

Name of Persons	Total Hours @ $15.00/hr.	Cost
1. Robert Koehler	16	$240.00
2. Virgil Luehrs	16	$240.00
3.		
4.		
5.		
6.		

7. _____

Supplies required:

paper, copying machines, rooms 211 & 209

Total Cost $480.00

5. How will project goals and outcomes be evaluated?
Implementation in the 1994-95 school year.

6. How will the project efforts be shared with others?
Registration guide.
Science departments 7-12.
Curriculum Director.

New Registration Guide Page

BIOLOGY (Grades 10-11-12)

Year long course. Semester one (A) should be taken before semester two (B)

Credit: one credit (1/2 credit per semester).

Course Description: Biology should be taken by all students. Biology, along with 9th grade science, gives the student the two science credits needed for graduation. Students taking only onescience class in Senior High School should take Biology as a Junior. Students planning on taking chemistry and physics should take Biology as a sophomore or in summer school. Summer School Biology however, is taught at a faster pace than the year long course, therefore students in summer school should be average or above average ability in order to be successful. Daily media topics such as genetic engineering, gene splicing, micro-organisms, disease, pollution heredity, selective breeding, cells, body chemistry, fitness, growth, reproduction, plants, food and medicine support the importance of taking this course in order to be

literate in many aspects of science which are impacting our world today.

The learner will be able to:

1. relate topics studied in Biology to the following themes:

a. Energy and Life. Energy from the sun is passed through all life.

b. Scale and Structure. Livign things are made of atoms organized into cells and increasing levels of complexity.

c. Stability. Living organisms maintain a constant internal balance.

d. Evolution. Natural selection and mutations are constantly causing changes in living things.

e. Patterns of Change. Cells grow and divide and organisms go through development in an orderly way because of instruction in the genetic material, the genes, which are made of DNA.

f. Interacting Systems. Living things interact with each other and their environment in complex and cooperative ways which are often upset by human activities.

2. use most of the following process skills:

observing	analyzing data	relating
inferring	evaluating	identifying
design experiments	demonstrate	collect data
contrast classify	modei	hypothesize
organize data	predict	state problems

3. use a variety of scientific instruments correctly and safely.

4. identify characteristics of living things.

5. know that science has limitations in solving society's problems.

6. examine opportunities available in science related careers.

7. identify beneficial and harmful effects of viruses and bacteria.

8. relate the dissection of an organism to human anatomy and physiology.

BIOLOGY:	Visualizing Life	Lab Activities
Chp. 1	Stereomicroscope Compound microscope	
Chp. 2	Acid Rain-Duckweed Microscope Living/Nonliving-see chapter 12 leaf litter lab pH activity	
Chp. 12	Continue labs from Chp. 2	
Chp. 13	Succession-Railroad Tracks Competition Seeds	
Chp. 14	Daphnia?	
Chp. 3	Microscopes Cell Labs pH	

Chp. 4	Diffusion/Dialysis starch Agar Block Potato/Carrot Onion Slides/Mitosis
Chp. 5	Enzymes/Liver, Hydrogen Peroxide, pH Calories Chromatography Elodea? Spontaneous Generation Demo pH Demo
Chp. 6	Probability-Gambling, MS, low level Genetic Profile, p. 134 Meiosis-analogy 23 pairs of shoes Pedigrees
Chp. 7	Protein Synthesis
Chp. 8	DNA Fingerprinting
Chp. 9	Peppered Moth
Chp. 15	Shark/Critter Keying Taxonomic keys
Chp. 16	Build Virus model Bacteria: Culture, Stain, Inhibition
Chp. 17	Observe Protists Slime molds
Chp. 18	Fungi Observations Bring in Fungi Peat-National Geographic
Chp. 19	Germinate Seeds for dissection Flower dissection Slides-roots, stems, leaves, 3 year system

	charts-wood celery stomata/Zebrina
Chp. 20	Speakers: Horticulture Wood samples "Paper articles"
Chp. 27	Sweat Glands Chicken Wings Pig at end of Chps. 27-33
Chp. 28	Vision-end of chp. Taste and smell
Chp. 29	
Chp. 30	Speakers
Chp. 31	Spirometer Step/Pulse test on gym mats, hallway, stairs
Chp. 32	Blood typing kit Disease transmission
Chp. 33	Fat digestion or digestion labs

(2)

No. 01-665

In the Supreme Court of the United States

RODNEY LEVAKE,

Petitioner,

v.

INDEPENDENT SCHOOL DISTRICT NO. 656, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF MINNESOTA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTION PRESENTED:

In Minnesota, the Minnesota Legislature has vested local school boards with the care, management and control of the school district, including prescribing the curriculum. Petitioner LeVake, a tenth grade biology teacher, was reassigned by Respondent Independent School District No. 656 to teach ninth grade introduction to physical science when he made it clear that he would not teach the required tenth grade biology course curriculum in the manner established by the School Board. The following question is presented:

Does LeVake, a teacher at a public secondary school, have a constitutional right to decide and to control the curricular decisions for his classroom?

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Uerling, Academic Freedom in K-12 Education,
79 Neb. L. Rev. 956 (2000) 21

STATUTES INVOLVED

Minn. Stat. § 123B.09, subd. 1. Boards of independent school districts.

Subdivision 1. School board membership. The care, management, and control of independent districts is vested in a board of directors, to be known as the school board. The term of office of a member shall be four years commencing on the first Monday in January and until a successor qualifies. The membership of the board shall consist of six elected directors together with such ex officio member as may be provided by law. The board may submit to the electors at any school election the question whether the board shall consist of seven members. If a majority of those voting on the proposition favor a seven-member board, a seventh member shall be elected at the next election of directors for a four-year term and thereafter the board shall consist of seven members.

Those districts with a seven-member board may submit to the electors at any school election at least 150 days before the next election of three members of the board the question whether the board shall consist of six members. If a majority of those voting on the proposition favor a six-member board instead of a seven-member board, two members instead of three members shall be elected at the next election of the board of directors and thereafter the board shall consist of six members.

Minn. Stat. § 120B.11. School district process

Subdivision 1. Definitions. For the purposes of this section and section 120B.10, the following terms have the meanings given them.

(a) "Instruction" means methods of providing learning experiences that enables a student to meet graduation standards.

(b) "Curriculum" means written plans for providing students with learning experiences that lead to knowledge, skills, and positive attitudes.

Subd. 2. Adopting policies. (a) A school board shall adopt annually a written policy that includes the following:

(1) district goals for instruction and curriculum;

(2) a process for evaluating each student's progress toward meeting graduation standards and identifying the strengths and weaknesses of instruction and curriculum affecting students' progress;

(3) a system for periodically reviewing all instructions and curriculum;

(4) a plan for improving instruction and curriculum; and

(5) an instruction plan that includes education effectiveness processes developed under section 122A.625 and integrates instructions, curriculum, and technology.

Subd. 3. Instruction and curriculum advisory committee. Each school board shall establish an instruction and curriculum advisory committee to ensure active community participation in all phases of planning and improving the instruction and curriculum affecting state graduation standards. A district advisory committee, to the extent possible, shall reflect the diversity of the district and its learning sites, and shall include teachers, parents, support staff, pupils, and other community residents. The district may

establish building teams as subcommittees of the district advisory committee under subdivision 4. The district advisory committee shall recommend to the school board districtwide education standards, assessments, and program evaluations. Learning sites may expand upon district evaluations of instruction, curriculum, assessments, or programs. Whenever possible, parents and other community residents shall comprise at least two-thirds of advisory committee members.

Subd. 4. Building team. A school may establish a building team to develop and implement an education effectiveness plan to improve instruction and curriculum. The team shall advise the board and the advisory committee about developing an instruction and curriculum improvement plan that aligns curriculum, assessment of student progress in meeting state graduation standards, and instruction.

Subd. 5. Report. (a) By October 1 of each year, the school board shall use standard statewide reporting procedures the commissioner develops and adopt a report that includes the following:

(1) student performance goals for meeting state graduation standards adopted for that year;

(2) results of local assessment data, and any additional test data;

(3) the annual school district improvement plans;

(4) information about district and learning site progress in realizing previously adopted improvement plans; and

(5) the amount and type of revenue attributed to each education site as defined in section 123B.04.

(b) The school board shall publish the report in the local newspaper with the largest circulation in the district or by mail. The board shall make a copy of the report available to the public for inspection. The board shall send a copy of the report to the commissioner of children, families, and learning by October 15 of each year.

(c) The title of the report shall contain the name and number of the school district and read "Annual Report on Curriculum, Instruction, and Student Performance." The report must include at least the following information about advisory committee membership:

(1) the name of each committee member and the date when that member's term expires;

(2) the method and criteria the school board uses to select committee members; and

(3) the date by which a community resident must apply to next serve on the committee.

Subd. 6. Student evaluation. The school board annually shall provide high school graduates or GED recipients who receive a diploma or its equivalent from the school district with an opportunity to report to the board the following:

(1) the quality of district instruction, curriculum, and services;

(2) the quality of district delivery of instruction, curriculum, and services;

(3) the utility of district facilities; and

(4) the effectiveness of district administration.

Subd. 7. Periodic report. Each school district shall periodically ask affected constituencies about their level of satisfaction with school. The district shall include the results of this evaluation in the report required under subdivision 5.

Subd. 8. Biennial evaluation; assessment program. At least once every two years, the district report shall include an evaluation of the district testing programs, according to the following:

(1) written objectives of the assessment program;

(2) names of tests and grade levels tested;

(3) use of test results; and

(4) implementation of an assurance of mastery program.

STATEMENT OF THE CASE

A. Facts.

1. Minnesota Law on Curriculum Control and Development.

Under Minnesota law, the care, management and control of a school district is vested in the local school board. Minn. Stat. § 123B.09, subd. 1. By statute, school boards are charged with the duty of managing the schools of their district, including prescribing textbooks and courses of study. Id., subd. 8. School boards must annually adopt a written policy that includes the district's goals for instruction and curriculum; a system for periodically reviewing all instruction and curriculum; a plan for improving instruction and curriculum; and an instruction plan which integrates instruction, curriculum and technology. Minn. Stat. § 120B.11, subd. 2. "Curriculum" is defined by statute as written plans for providing students with learning experiences that lead to knowledge, skills and positive attitudes. Id., subd. 1(b). It is differentiated from "instruction" which is the method of providing learning experiences that enable a student to meet graduation standards. Id., subd. 1(1)(a).

Pursuant to Minn. Stat. § 120B.11, subd. 3, each school board must establish an instruction and curriculum advisory committee to ensure active community participation in all phases of planning and improving the instruction and curriculum affecting state graduation standards. The statute provides:

> A district advisory committee, to the extent possible, should reflect the diversity of the district and its learning sites, and shall include teachers, parents, support staff, pupils and

> other community residents. . . . Whenever possible, parents and other community residents shall comprise at least two-thirds of advisory committee members.

Id. Every school board is required to publish its "annual report on curriculum, instruction and student performance." Id., subd. 5.

In accord with Minnesota statutes, Respondent/Defendant Independent School District No. 656's (School District) School Board followed the statutorily mandated curriculum adoption process and adopted a curriculum. The School District teachers are part of both the curriculum adoption process and the curriculum review process. (Dixon Depo., pp. 20-21.)

As adopted by the School District's School Board, the teaching of evolution is a required part of the tenth grade biology curriculum. The required textbook is "Biology: Visualizing Life," which contains three chapters -- 9, 10 and 11 -- dealing with aspects of evolution. This textbook is the curriculum.[1] (Dixon Depo., p. 20.) In order to ensure that each student gets the same basic educational experience, this curriculum is required to be taught by each tenth grade biology teacher. (Dixon Depo., p. 24.) Accordingly, all tenth grade biology teachers must cover Chapter 9 while Chapters 10 and 11 were optional. With regard to Chapter 9,

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[1] In LeVake's appendix [App.] to his petition at 49a-52a, he presents to this Court only the course syllabus, not the curriculum. As LeVake is well aware, the syllabus is not part of the curriculum adopted by the School Board. (Defendants' Supplemental Response to Request for Production of Documents dated 4/4/00.)

the required lab activity is the "peppered moth." (Respondents' Appendix [A] 1.)

2. LeVake's Acceptance of Tenth Grade Biology Teaching Position.

LeVake is a teacher who has been employed by the School District since 1984. (LeVake Depo., p. 92.) In the summer of 1997, LeVake was offered the tenth grade biology teaching position because a teacher was retiring. (LeVake Depo., pp. 96-97.) Before accepting the position, LeVake discussed the course with Ken Hubert, co-chairman of the high school science department, and Respondent/Defendant Dave Johnson (Mr. Johnson), the high school principal. (LeVake Depo., p. 98.) LeVake also talked to Dave Wieber, the other co-chairman of the high school science department. (Wieber Depo., p. 9.) Mr. Wieber explained to LeVake what the biology curriculum entailed and that all teachers were expected to follow it. (Id.)

LeVake has acknowledged that evolution is the framework and foundation of modern biology. (LeVake Depo., pp. 45-48.) In LeVake's own post-secondary formal science education, LeVake was taught that evolution is the accepted framework of modern biology. (Id.) LeVake, however, has come to the conclusion that evolution is, for the most part, factually unsupportable. (LeVake Depo., p. 71.) LeVake acknowledges his criticisms of evolution were not presented to him in his own formal science educational training but are the result of his hobby of reading articles that are critical of evolution. (LeVake Depo., pp. 45-47.) LeVake was unaware of any public educational institution that

presents his criticisms of biology and evolution.[2] (LeVake Depo., p. 47.)

LeVake admits that he understood before he accepted the position that it was important that all tenth grade biology teachers cover the same materials and he knew that Chapter 9 was one of the required chapters to be taught. (LeVake Depo., p. 107.) LeVake admits that he also was told and that he understood that the theory of evolution was part of the Minnesota standards for education. (LeVake Depo., p. 64.) LeVake also knew that the required biology textbook more than likely did not contain the criticisms of evolution he wanted to teach. (LeVake Depo., pp. 100-01.) LeVake had reservations about teaching evolution. (LeVake Depo., pp. 64, 71.) Nonetheless, he accepted the position and did not tell anyone at the School District that he had such reservations about the curriculum. He did not approach the School District's curriculum advisory committee and present to it his concerns with the curriculum. (LeVake Depo., pp. 100-01.)

3. LeVake's Refusal to Teach Evolution.

Before LeVake taught each chapter of the biology textbook, LeVake would prepare an outline for that chapter.

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[2] One article has since described LeVake's criticisms as a repackaged version of creationism, noting that the books LeVake cites have been rejected by the National Academy of Sciences as well as by most prominent scientific publications. Rosenberg, Notes & Comments, Monkey Business and Unnatural Selection: Opening the Schoolhouse Door to Religion by Discrediting the Tenets of Darwinism, 9 Journal of Law & Policy 611, 682 (2001).

LeVake did not prepare outlines for the three chapters addressing evolution. (LeVake Depo., p. 108.)

In the spring, Mr. Hubert, a co-chair of the high school science department, observed that while both he and Mr. Koehler, the other tenth grade biology teacher, had already covered Chapter 9 on evolution, LeVake appeared to have skipped it. (Hubert Depo., p. 17.) Mr. Hubert was sure that LeVake was not teaching evolution. (Hubert Depo., p. 16.)

Mr. Hubert, as co-chairman of the science department, asked LeVake how he was going to handle the topic of evolution. (LeVake Depo., p. 64.) In response, LeVake admits that he told Mr. Hubert that he could not teach evolution. (Id.) LeVake described his conversation with Mr. Hubert as follows:

> Q. Okay. And what conversation did you have with [Mr. Hubert]?
>
> A. Well, the essence of the conversation was is that he asked me how I was going to handle the topic of evolution. His concern was it's kind of -- he wanted to be in line with the Minnesota stands [sic] for education in the federal goals 2000 things and they -- these particular standards had indicated that the student needs to have kind of a working knowledge of evolution and he wanted to know how I was going to handle that.
>
> Q. Okay. What did you tell him?

> A. Well, it was a -- it was about a half hour discussion but in essence I said to him I can't teach evolution. That's what I told him.

(LeVake Depo., p. 64.) Mr. Hubert recalled that LeVake told him he "will not teach something that's not true" and he would "rather go back to farming before he would ever do that."[3] (Hubert Depo., p. 26.)

LeVake, in the course of this litigation, has admitted he skipped Chapters 10 and 11. LeVake testified that all he had the students do with regard to Chapter 9 was the required lab on the peppered moth.[4] (LeVake Depo., p. 108.)

LeVake has subsequently offered as his explanation for his failure to teach evolution that the school year was short and that he did not have time to cover those chapters. (LeVake Depo., p. 116.) He later admitted that even though the school year was shortened by a month, each class period had been lengthened so that the seat time was almost identical to a regular school year. (Id.)

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[3] In his petition at page 5, LeVake now describes this conversation with Mr. Hubert as one in which he "expressed certain scientific doubts about aspects of Darwin's theory to fellow teacher Ken Hubert, in a private, casual conversation."

[4] LeVake later attempted to contradict his deposition testimony with his affidavit testimony. Under Minnesota law, such contradictory affidavit testimony is inadmissible. Banbury v. Omnitrition Int'l, Inc., 533 N.W.2d 876, 881 (Minn. Ct. App. 1995). In his appendix to his petition at 34a-38a, LeVake has presented to this Court only his inadmissible affidavit testimony.

Fatal to LeVake's explanation is testimony that at the beginning of the school year LeVake told the students he would not cover the chapters devoted to evolution. Mr. Benbrooks, a special education paraprofessional aide, had the duty of taking notes in LeVake's class for a handicapped special education student. He recalls LeVake told the class he would not cover human reproduction, because that was covered in another class the students were going to take, and that he was not going to cover the theory of evolution. According to Mr. Benbrooks, LeVake told the class he was "strongly against the theory of evolution" and had "strong beliefs that conflicted with evolution." (Benbrooks Aff.; A6.)

4. Meetings of School District Officials With LeVake and Decision to Reassign.

Based on Mr. Hubert's conversation with LeVake, Mr. Hubert approached Mr. Johnson, the high school principal, about his concern that LeVake was not teaching evolution. (Hubert Depo., pp. 16, 26.) He also informed Respondent/Defendant Cheryl Freund (Ms. Freund), who was responsible for the School District curriculum, of his concern. (Freund Depo., pp. 9, 23.) LeVake, Mr. Hubert, Ms. Freund and Mr. Johnson met on April 1, 1998. (Freund Depo., p. 34.) The purpose of the meeting was to discuss the School District's expectations on the teaching of the biology curriculum and how LeVake was teaching evolution to his biology class. (Freund Depo., p. 35; Johnson Depo., p. 26.)

At that meeting LeVake was told about their concern that LeVake was avoiding the subject of evolution and was not teaching the concept as required by the curriculum. (Johnson Depo., p. 26.) LeVake did not deny he was avoiding the subject of evolution with his students. (Johnson Depo., pp. 27-28.) LeVake then expressed his concerns about the theory

of evolution itself. (Johnson Depo., p. 28.) He talked about the moth and presented a series of theories which he felt refuted evolution. (Freund Depo., pp. 35-36.) LeVake stated that he enjoyed reading as much as possible on the weaknesses of evolution, that evolution was not a viable concept, that he had difficulty with the theory, and there were many students who were appreciative of knowing that they did not have to learn about evolution. (Freund Depo., pp. 37-40; Hubert Depo., p. 26.) LeVake stated he was teaching the weaknesses of evolution because that was what inspired him. (Id.)

LeVake admits that at that meeting he never discussed his religious beliefs. (LeVake Depo., p. 137.) Ms. Freund did ask LeVake if he mentioned the Bible or God in his class. LeVake acknowledged that Ms. Freund properly asked such questions to ensure he was not discussing religion in his class or trying to convert the students to his way of thinking. LeVake understood the reason for her questions and that they were appropriate. (LeVake Depo., pp. 140-41.)

LeVake, Mr. Johnson, Ms. Freund and Mr. Hubert met again on April 7, 1998, with the rest of the members of the science department. (LeVake Depo., p. 141.) Again, LeVake recalled there was no discussion of religion. (LeVake Depo., p. 143.) At that meeting, the science department members reaffirmed that evolution was a basic tenet of biology and part of the course curriculum for the tenth grade course. (Freund Depo., pp. 48-49; Johnson Depo., pp. 34-36.) The staff also emphasized that teaching evolution was part of the state graduation standards, the National Standards of the Teachers Association and the National Science Frameworks and thus required to be taught. Concern was also expressed about teaching pseudoscience. (Id.)

LeVake again told the group that he had concerns about teaching the theory of evolution and was adamant that

he wanted to teach what he perceived as its weaknesses. (Freund Depo., p. 49.) The responsibility for the decision to have LeVake reassigned rested with Mr. Johnson, the high school principal.[5] (Dixon Depo., p. 16.) No decision was made at that time to reassign LeVake. (Johnson Depo., p. 37.) Mr. Johnson instead asked LeVake to write a position paper outlining how LeVake would balance the teaching of evolution with his hobby of reading materials on the weaknesses of the theory. (Johnson Depo., pp. 35-36.)

LeVake did prepare a position paper outlining his position on teaching evolution. (App. 39a.) In his paper, LeVake states that the "process of evolution itself is not only impossible from a biochemical, anatomical, and physiological standpoint, but the theory of evolution has no evidence to show that it actually occurred." (Id. at 40a.) LeVake further states that he "will teach should the department decide that it is appropriate, the theory of evolution." He also states, however, that he will "accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory . . ." (Id. at 45a.)

Mr. Johnson has explained that the reason for asking LeVake to write a position paper was that he was trying to keep an open mind on the issue. (Johnson Depo., p. 36.) He recognized that science is an area of inquiry and one is always looking for new information and a new perspective on things.

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[5] LeVake, in his petition, has referred to statements made by Ms. Freund as to the reasons for his removal. As the Minnesota Court of Appeals recognized and as the record undisputedly established, Ms. Freund did not have the authority to reassign LeVake. Thus it was only Johnson's reason for reassigning LeVake and Dixon's reasons for supporting the decision that are germane. (App. 8a.)

He wanted to see how LeVake was going to balance the teaching of evolution with his stated hobby of looking at the inconsistencies in the theory. (Id.) From the reading of LeVake's position paper, Mr. Johnson was concerned not only with the amount of time that would be spent teaching evolution's inconsistencies as opposed to the theory itself but also the "spin or the emphasis or the importance" placed on the inconsistencies of the theory. Mr. Johnson was concerned that the theory of evolution was not going to receive adequate treatment as a unifying concept of biology versus an emphasis being placed on its purported inconsistencies. (Johnson Depo., pp. 57-58.) It was clear to Mr. Johnson that from "everything taken in total" that "Rod [LeVake] was not going to be able to hold back from teaching, spending a lot of time or putting undue emphasis on the inconsistencies of evolution." (Johnson Depo., pp. 58-59; Freund Depo., p. 63.) He reassigned LeVake to teach ninth grade introduction to physical science. (LeVake Depo., pp. 154-55.)

LeVake asked the School District's superintendent, Respondent/Defendant Keith Dixon (Mr. Dixon), to review Mr. Johnson's decision to reassign him. (LeVake Depo., pp. 155-56.) After reviewing LeVake's position paper and talking to participants in the meetings including LeVake, Mr. Dixon upheld Mr. Johnson's decision to reassign. (Dixon Depo., pp. 22, 26.) In his letter to LeVake affirming the reassignment decision, Mr. Dixon concurred that it was appropriate to reassign LeVake because LeVake clearly had demonstrated he could not teach the prescribed curriculum. (Dixon Depo., pp. 29-32.) Mr. Dixon in his letter to LeVake states:

> You asserted to me that you believe that you can teach the prescribed curriculum. However, in your explanation, you continue to justify why it is appropriate not to follow the

curriculum by pointing out the "discrepancies" that you believe exist. These "discrepancies" appear to be an itemization of your disagreement with the curriculum.

You suggest that these "discrepancies" can be passed on to students as "teaching them to think for themselves." Your explanation compels me to believe that you fundamentally differ with the commonly held principles of the curriculum as outlined. You have expressed not only fundamental and extensive conflicts with the curriculum, but more importantly, have made it clear that you cannot teach the curriculum. Rather, you propose to use the curriculum as a basis for pointing out and discussing both the extent of your disagreement with the curriculum and why it is that the curriculum is incorrect. Such an approach cannot be said to constitute teaching the Board of Education's approved curriculum. While you may be personally intrigued by the discrepancies which you perceive and want to pursue them on your own, the classroom is not the appropriate forum in which to do so.

In a public school system, the prescribed curriculum is the responsibility of the board of education. And, while curriculum development involves the staff, ultimately the Board has the responsibility for adopting the curriculum.

(A 8-9.)

5. Result of Reassignment.

LeVake has acknowledged that his reassignment to teach ninth grade science was not a demotion. (LeVake Depo., pp. 95-96.) There have been no changes to his teaching contract. LeVake admits he has not sustained any personal monetary loss nor any loss of benefits. He has not lost any seniority by his reassignment. (LeVake Depo., p. 169.) LeVake also admits that no one in the department has treated him differently because of his reassignment. (LeVake Depo., p. 170.)

B. LeVake's Lawsuit.

LeVake's sole intention in bringing this lawsuit is to "have my biology teaching job back," including the right to teach his criticisms of the theory of evolution. (LeVake Depo., pp. 167-68.) LeVake sued Respondents under 42 U.S.C. § 1983, alleging First Amendment violations of the Free Exercise of Religion Clause, the Establishment Clause and the Free Speech Clause. LeVake also alleged a violation of his academic freedom as a § 1983 cause of action. LeVake asserted that Respondents denied him due process under the federal and state Constitutions. He also alleged violation of his free speech rights and his right to freedom of conscience under the Minnesota State Constitution. (A 11.)

By summary judgment, the district court dismissed all of LeVake's claims with prejudice on the merits. (App. 12a.) LeVake then appealed to the Minnesota Court of Appeals, which affirmed the grant of summary judgment. (App. 2a.) In affirming, the Court of Appeals states:

> Because LeVake's position paper and his statement to Hubert made it clear that LeVake would not teach the required course curriculum

> in the manner established by the school board, LeVake has not presented any genuine issue of material fact regarding his free exercise, free speech, and due process claims. Thus, the district court did not err in granting respondents' motion for summary judgment.

(App. 11a.) The Minnesota Supreme Court denied LeVake's petition for further review. (App. 1a.)

REASONS WHY PETITION SHOULD BE DENIED

THE MINNESOTA COURTS' DISMISSAL OF LEVAKE'S ACTION IS IN ACCORD WITH THIS COURT'S DECISIONS.

LeVake has, until seeking certiorari by this Court, asserted that Respondents deprived him of his free exercise of religion. Before this Court LeVake now limits his constitutional claims to an alleged deprivation of his free speech/academic freedom rights and claims he is a victim of unconstitutional "viewpoint discrimination." LeVake argues that certiorari is appropriate by using bits and pieces of prior opinions of this Court unrelated to the real issue of this case and claims that the decision below "conflicts squarely with this Court's case law," reflects "conflicts in the lower courts on the issue of constitutional protection of classroom speech" and "conflicts with this Court's precedents regarding viewpoint discrimination."

The real issue in this case is LeVake's contention that he has a First Amendment right to establish the curriculum to be taught in his classroom and to teach what he wishes in accord with his own personal views. This Court has never recognized such a First Amendment right and the Minnesota Court of Appeals decision dismissing LeVake's constitutional

challenge is certainly not in conflict with this Court's decisions. LeVake's petition should be denied.

Cases to which LeVake cites that have referred to a First Amendment right of academic freedom have done so generally in terms of the institution, not the individual. For example, in Keyishian v. Board of Regents of University of State of of N.Y., 385 U.S. 589 (1967), this Court considered a renewed challenge to a New York statute and regulations which were designed "to prevent the appointment or retention of 'subversive' persons in state employment." Keyishian, 385 U.S. at 592. Keyishian involved the right of a professor to speak and associate in his capacity as a private citizen and thus is not germane to LeVake's claim. Moreover, in the course of reaching its conclusion that the provisions were unconstitutionally vague, this Court discussed the detrimental impact of such laws on academic freedom, which the Court characterized as "a special concern of the First Amendment." Id. at 603. The discussion by the Court indicates, however, that it was not focusing on the individual rights of teachers, but rather on the impact of the New York provisions on schools as institutions. The vice of the New York provisions was that they impinged upon the freedom of the University as an institution. See University of Pennsylvania v. E.E.O.C., 493 U.S. 182 (1990) (noting that Keyishian was a case involving governmental infringement on the right of an institution "to determine for itself on academic grounds who may teach").

Significantly, this Court has never recognized, even at the post-secondary level, that teachers possess a First Amendment right of academic freedom to determine for themselves the content of their course despite opportunities to do so. For example, in Epperson v. State of Arkansas, 393 U.S. 97 (1968), a case relied on by LeVake, the Court considered a challenge to a state law that prohibited the

teaching of evolution. The Court repeated its admonition in Keyishian that "the First Amendment does not tolerate laws that cast a pall of orthodoxy over the classroom." Epperson, 393 U.S. at 105 (quoting Keyishian, 385 U.S. at 603), but nevertheless declined to invalidate the statute on the basis that it infringed the teacher's right of academic freedom. Rather, the Court held that the provision violated the Establishment Clause. See id. at 106-09.

Almost 20 years later, the opportunity to create an individual First Amendment right of academic freedom again arose in Edwards v. Aguillard, 482 U.S. 578 (1987), another case involving limitations on a public school teacher's authority to teach evolution and a case cited by LeVake. In Edwards, a state statute required that instruction on evolution be accompanied by teaching on creation science. As in Epperson, this Court decided the case on Establishment Clause grounds. See Edwards, 482 U.S. at 596-97. This time, however, the court did not even mention academic freedom as a relevant consideration in holding the statute unconstitutional.

Instead, this Court has repeatedly held that "public education in our nation is committed to the control of state and local authorities." Epperson v. State of Arkansas, 393 U.S. at 104. As a result, local authorities have broad discretion in choosing a suitable curriculum. See Edwards, 482 U.S. at 583; Webster v. New Lenox School Dist. No. 122, 917 F.2d 1004, 1007 (7th Cir. 1990).

As this Court has held, the government as educator is subject to fewer strictures when operating an elementary and secondary school system than when operating an institution of higher learning. Cf. Tilton v. Richardson, 403 U.S. 672, 685-86 (1971) (opinion of Burger, C.J.). Elementary and secondary schools are inculcative in nature. Unlike

universities, "elementary and secondary schools are not designed for freewheeling inquiry; they are tailored to the teaching of basic skills and ideas." Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting).

No court has found that a public school teachers' First Amendment rights extend to choosing their own curriculum in contravention of school policy or dictates. Uerling, Academic Freedom in K-12 Education, 79 Neb. L. Rev. 956, 961 (2000). In disputes between school officials and teachers arising over "academic freedom" in the classroom, the courts have consistently supported the authority of school boards and administrators to exercise control over teachers and their teaching. As explained by the Seventh Circuit Court of Appeals:

> Parents have a vital interest in what their children are taught. Their representatives have in general prescribed a curriculum. There is a compelling state interest in the choice and adherence to a suitable curriculum for the benefit of our young citizens in society. It cannot be left to individual teachers to teach what they please.

Palmer v. Board of Education of the City of Chicago, 603 F.2d 1271, 1274 (7th Cir. 1979), cert. denied, 444 U.S. 1026 (1980).

Contrary to LeVake's contention, the First Amendment simply does not require school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers. Kirkland v. Northside Indep. School Dist., 890 F.2d 794, 795 (5th Cir. 1989), cert. denied, 496 U.S. 926 (1990). As the Fifth Circuit stated in

Kirkland, 890 F.2d at 801-02, "public school teachers are not free, under the First Amendment, to arrogate control of curricula. Parents, administrators, and elected officials also have a legitimate role in the process of selecting material that will advance educational goals, a role that cannot lightly be assumed by teachers alone." Id. When an administrative process is established to compile and amend officially approved material with input from parents, administrators and educators, teachers must also respect that process. Id.

In Minnesota, the Legislature has vested local school boards with the authority to establish an appropriate curriculum. LeVake has disregarded the School District's administrative process and instead asserts that his personal preferences and viewpoints override the dictates of the School Board, its administrators and the parents of the School District. This case presents not a matter of public concern but rather an employment dispute. LeVake simply decided on his own not to follow the curriculum. LeVake did so even though he has acknowledged that evolution is the foundation of modern biology and has acknowledged that he is required to teach evolution both by the School District's curriculum as well as the graduation standards in Minnesota. Whereas all other tenth grade biology students in the School District were taught the foundations of modern biology, LeVake's tenth grade students, because of LeVake's actions, were not. When confronted with his failure to follow the curriculum, LeVake declared to the co-chairman of the science department, "I can't teach evolution." Since that declaration, LeVake has insisted on tailoring the curriculum so that his personal disagreement with the curriculum could be presented to his students as part of their course work.

If LeVake's argument that every public school teacher has a constitutional right to design, even in part, the content of his class were accepted, the nation's school boards would

be without the most basic authority to implement a uniform curriculum. This Court has never held that under the First Amendment, schools are the mere instruments of the advancement of the individual agendas of its teachers. As the Minnesota Court of Appeals correctly held, the School District did not violate any constitutional right in its reassignment of LeVake.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

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Dated: November 19, 2001

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New Registration Guide for Biology
(Grades 10-11-12) . . . . . A 1

Affidavit of Joel Benbrooks dated
March 24, 2000 . . . . . A 6

Correspondence from Keith M. Dixon,
Superintendent, to Rod LeVake dated
May 14, 1998 . . . . . A 8

Complaint dated May 24, 1999 . . . . . A 11

New Registration Guide page:

BIOLOGY (Grades 10-11-12)

Year long course. Semester one (A) should be taken before semester two

Credit: one credit (1/2 credit per semester).

Course Description: Biology should be taken by all students. Biology, along with 9th grade science, gives the student the two science credits needed for graduation. Students taking only one science class in Senior High School should take Biology as a Junior. Students planning an taking chemistry and physics should take Biology as a sophomore or in summer school. Summer School Biology however, is taught at a faster pace than a year long course, therefore students in summer school should be average or above average ability in order to be successful. Daily media topics such as genetic engineering, gene splicing, micro-organisms, disease, pollution, heredity, selective breeding, cells, body chemistry, fitness, growth, reproduction, plants, food and medicine support the importance of taking this course in order to be literate in many aspects of science which are impacting our world today.

The learner will be able to:

1. relate topics studied in Biology to the following themes:

a. Energy and Life. Energy from the sun is passed through all life by the processes of photosynthesis, respiration and fermentation.

b. Scale and Structure. Living things are made of atoms organized into cells and increasing levels of complexity.

c. Stability. Living organisms maintain a constant internal balance.

d. Evolution. Natural selection and mutations are constantly causing changes in living things.

e. Patterns of Change. Cells grow and divide and organisms go through development in an orderly way because of instruction in the genetic material, the genes, which are made of DNA.

f. Interacting Systems. Living things interact with each other and their environment in complex and cooperative ways which are often upset by human activities.

2. use most of the following process skills:

observing	analyzing data	relating
inferring	evaluating	identifying
design experiments	demonstrate	collect data
measure	calculate	compare & contrast
classify	model	hypothesize
organize data	predict	state problems

3. use a variety of scientific instruments correctly and safely.

4. identify characteristics of living things.

5. know that science has limitations in solving society's problems.

6. examine opportunities available in science related careers.

7. identify beneficial and harmful effects of viruses and bacteria.

8. relate the dissection of an organism to human anatomy and physiology.

BIOLOGY: VISUALIZING LIFE

Approximate schedule of chapters by semester and quarter.

Semester one(A):
13 chapters plus 2 optional

1st quarter: Chapters 1, 2, 12, 13, 14, 3, 4
2nd quarter: Chapters 5, 6, 7, 8, 9, 15
Optional Chapters: 10, 11, and maybe 21, 22

Semester two (B)
12 chapters plus 4 chapters overview and 3 chapters optional
3rd quarter: Chapters 16, 17, 18, 19, 20 overview of 23, 24, 25, 26
4th quarter: Chapters 27, 28, 29, 30, 31, 32, 33, pig dissection,
Optional Chapters: 21, 22, 34

BIOLOGY	Visualizing Life	Lab Activities
Chp. 1	Stereomicroscope Compound Microscope	

Chp. 2	Acid Rain-Duckweed Microscope Living/Nonliving - see chapter 12 leaf litter lab pH activity
Chp. 12	Continue labs from Chp.2
Chp. 13	Succession - Railroad Tracks Comnpetition Seeds
Chp. 14	Daphnia?
Chp. 3	Microscopes Cell Labs pH
Chp. 4	Diffusion/Dialysis starch Agar Block Potato/Carrot Onion Slides/Mitosis
Chp. 5	Enzymes/Liver, Hydrogen Peroxide, pH Calories Chromatography Elodea? Spontaneous Generation Demo pH Demo
Chp. 6	Probability - Gambling, MS, low level Genetic Profile, p. 134 Meiosis - analogy 23 pair of shoes Pedigrees
Chp. 7	Protein Synthesis
Chp. 8	DNA Fingerprinting

Chp. 9	Peppered Moth
Chp.15	Shark./Critter Keying Taxonomic keys

STATE OF MINNESOTA DISTRICT COURT

RICE COUNTY THIRD JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

Rodney LeVake,

Civil File No. CX-99-793

Plaintiff,

AFFIDAVIT OF JOEL BENBROOKS

v.

Independent School District #656;
Keith Dixon, Superintendent;
Dave Johnson, Principal; and
Cheryl Freund, Curriculum Director,

Defendants.

STATE OF MINNESOTA)
) ss.
COUNTY OF RICE)

Joel Benbrooks, being first duly sworn upon oath, deposes and states as follows:

1. I was an employee of the Faribault school district during the 1997/98 school year. I was a special education paraprofessional aid. One of my duties was to take notes for one of the District's handicapped special education students. I attended Rodney LeVake's 1997/98 Faribault Senior High School Biology class as a note-taker for this student and was present for the class for both semesters as taught by Mr. LeVake that year.

2. I thought Mr. LeVake was an excellent teacher. I respect him, admire him a lot and consider him to be a friend. In the biology class and as a coach, I could tell that he cared about his students and noticed that he was well-liked by his students. Students wanted to be in his classes.

3. At the beginning of the first semester of the 1997/98 Biology class that Mr. LeVake taught, he reviewed with the class what he was and was not going to cover in the class. He told the class that he was not going to be covering human reproduction because that was going to be covered in another class the students were going to be taking. He also told the class that he was not going to cover the section on the theory of evolution. He said he was strongly against the theory of evolution. He explained that he had strong beliefs that conflicted with evolution. He also said that if he was not allowed to also cover the criticisms and weaknesses in the theory, then he was not going to cover evolution at all. To me, personally, I saw nothing wrong with this.

FURTHER YOUR AFFIANT SAYETH NOT.

/s/_____
Joel Benbrooks

Subscribed and sworn to before me
this 24th day of March, 2000.

/s/ Sharon L. Gillen_____
Notary Public

[Seal]

INDEPENDENT SCHOOL DISTRICT 656
FARIBAULT AREA PUBLIC SCHOOLS
P.O. BOX 618
2855 FIRST AVENUE N.W.
FARIBAULT, MINNESOTA 55021
(507) 334-2291

May 14, 1998

Mr. Rod LeVake
4400 240th Street West
Faribault, MN 55021

Dear Rod:

When we met on Tuesday, May 5, 1998, you asked me to set forth in writing the results of your appeal to me regarding your teaching assignment for the 1998-99 school year at Faribault Senior High School.

Mr. Dave Johnson, Principal, with Mrs. Cheryl Freund, Curriculum Director, informed you that you will be reassigned from Biology to another science position. You are requesting to remain in Biology.

As indicated by contract, Mr. Johnson has the responsibility to determine teaching assignment for all staff. I believe this to be a major responsibility of an administrator. The District has the authority to place staff in a position we believe is best for the staff member and results in the highest learning for students. Great care, thought, and consideration are given in these important decisions.

To reach their decision, Dave and Cheryl approached your assignment in the manner I have described. They have met with you personally, read your written views of this

matter, and reviewed documentation from state and national organizations regarding the content and teaching of Biology. I also appreciate your willingness to interact with them candidly regarding your feelings and views on this topic.

You asserted to me that you believe that you can teach the prescribed curriculum. However, in your explanation, you continue to justify why it is appropriate not to follow the curriculum by pointing out the "discrepancies" that you believe exist. These "discrepancies" appear to be an itemization of your disagreement with the curriculum.

You suggest that these "discrepancies" can be passed on to students as "teaching them to think for themselves." Your explanation compels me to believe that you fundamentally differ with the commonly held principles of the curriculum as outlined. You have expressed not only fundamental and extensive conflicts with the curriculum, but more importantly, have made it clear that you cannot teach the curriculum. Rather, you propose to use the curriculum as a basis for pointing out and discussing both the extent of your disagreement with the curriculum and why it is that the curriculum is incorrect. Such an approach cannot be said to constitute teaching the Board of Education's approved curriculum. While you may be personally intrigued by the discrepancies which you perceive and want to pursue them on your own, the classroom is not the appropriate forum in which to do so.

In a public school system, the prescribed curriculum is the responsibility of the Board of Education. And, while curriculum development involves the staff, ultimately, the Board has the responsibility for adopting the curriculum.

Therefore, I am in support of Mr. Dave Johnson's re-assignment for you.

Sincerely,

s/s

Keith M. Dixon
Superintendent

CC: Cheryl Freund, Executive Director, ESST
Dave Johnson, Principal, FSHS

STATE OF MINNESOTA DISTRICT COURT

RICE COUNTY THIRD JUDICIAL DISTRICT

CASE TYPE: OTHER CIVIL

RODNEY LEVAKE

Plaintiff, COMPLAINT

v. CIVIL FILE N0. _____

INDEPENDENT SCHOOL DISTRICT 656, KEITH M. DIXON, SUPERINTENDENT, FARIBAULT SENIOR HIGH SCHOOL, DAVE JOHNSON, PRINCIPAL, CHERYL FREUND, CURRICULUM DIRECTOR

Defendants.

Plaintiff, Rodney LeVake, for his claim of relief against defendants herein, states and alleges as follows:

INTRODUCTION

1. Plaintiff, Rodney LeVake (hereafter "LeVake"), is a citizen of the United States and the State of Minnesota. He was at all relevant times employed by the defendant School District as a high school teacher at the Faribault Senior High School.

2. Defendant Independent School District 656 (hereafter "The District"), is a school district organized

pursuant to Minnesota Statute 123 B.02 with general charge of the business of the district including Faribault Senior High School.

3. Defendant, Keith M. Dixon (hereafter "Dixon" or "the Superintendent"), was at all relevant times the Superintendent of Schools for Independent School District 656. Defendant Dixon is sued individually and in his official capacity.

4. Defendant, Dave Johnson (hereafter "Johnson" or "the Principal"), was at all relevant times the Principal of Faribault Senior High School, Defendant Johnson is sued individually and in his official capacity.

5. Defendant, Cheryl Freund (hereafter "Freund"), was at all times relevant the Curriculum Director for the Faribault Senior High School. Defendant Freund is sued individually and in her official capacity.

6. Plaintiff, Rod LeVake, was employed by the District as a biology teacher in the 1997-98 academic year. LeVake was assigned to teach biology at the Faribault Senior High School.

7. LeVake is a 1977 graduate of St. John's University where he majored in natural science and social science. In 1984, he received his master's degree in Biology Education from Mankato State University. His assignment as a biology teacher at Faribault was the realization of his long-time career goal.

8. The textbook LeVake was assigned for his 10th grade Biology class was entitled *"Biology, Visualizing Life."* The book contains several chapters in which the theory of evolution is mentioned. Section 10.1 of the textbook, entitled

"Origin of Life," contains the following statement: "In principle, there care at least three ways life could have begun ... Extraterrestrial origin ... Creation ... Origin from nonliving matter."

9. LeVake holds the view that the teaching of evolution in high school should be accompanied by a critical examination of the scientific arguments and evidence both for and against the theory. He does not believe that belief in evolution as an unquestionable fact is or should be a requirement for teaching the subject of Biology. LeVake expressed this view to colleagues on the Faribault High School faculty at various times during the 1997-98 school year. At the same time, he made it clear that he was not interested in teaching creationism or creation science.

10. LeVake anticipated teaching a unit on evolution during the academic year. Because of a shortening of the school year LeVake's class never reached that section of the textbook.

11. On or about April 2,1998, at about 7:15 AM, with no prior notice, LeVake was summoned to a meeting with the chairman of the science department and defendants Freund and Johnson. The meeting consisted of a discussion of LeVake's views on the theory of evolution and how it should be taught. During this meeting, defendant Freund asked LeVake whether or not his students knew he was a Christian. Freund also asked LeVake whether he ever mentioned God or the Bible in his science class. Plaintiff responded that he did not.

12. Plaintiff's religious beliefs were well known to the defendants. For several years, plaintiff has been called upon to deliver a religious invocation at the high school

football banquet. He is active in his local church. He is known as a person of conservative religious views.

13. On April 7, 1998, LeVake was summoned to a meeting with the entire science department. Once again the discussion centered around LeVake's views on the theory of evolution and how it should be taught in high school. At the conclusion of this meeting, defendant Johnson asked LeVake to write a brief position paper on what he questioned about evolution and how he would teach the subject in the classroom.

14. On April 15, 1998, LeVake distributed to Freund, Johnson and other members of the science department his "A position paper on the teaching of evolution." (Exhibit A, attached)

15. Included in that paper were the following statements by LeVake: "I will teach, should the department decide that it is appropriate, the theory of evolution. I will also accompany that treatment of evolution with an honest look at the difficulties and inconsistencies of the theory without turning my class into a religious one."

16. On April 29, 1998, plaintiff had another meeting with defendants Freund and Johnson. The defendants told plaintiff that they had decided that he would no longer be assigned to teach biology at Faribault Senior High School but would be reassigned to another science teaching position.

17. On April 30, 1998, LeVake told defendant Johnson that he wished to appeal to defendant Dixon regarding the reassignment. LeVake met with Dixon on May 5, 1998. At that meeting LeVake asked Dixon to set forth in writing the results of his appeal.

18. On May 14, !998, defendant Dixon affirmed defendant Johnson's reassignment of LeVake. In a letter to LeVake of the same date, defendant Dixon stated "You . . . have made it clear that you cannot teach the curriculum." Dixon's letter completely ignored LeVake's repeated assertions in both his position paper and conversations that he could and would teach the theory of evolution if directed to do so.

19. Since the events described above, LeVake has been reassigned to a general science teaching position. Despite the fact that LeVake is the only member of the school's science department with a Masters degree in Biology Education, the defendants will not allow him to teach Biology.

20. Shortly before LeVake was dismissed as a biology teacher, defendant Freund spoke to a member of the school board and told the board member that LeVake had a deep internal conflict between his religious beliefs and teaching evolution. Freund told the board member that, because of this alleged conflict, the school would have to remove LeVake as a biology teacher. Freund made these statements despite knowing that LeVake had repeatedly assured her and other school officials that no such conflict existed, he could and would teach evolution, and that his religious beliefs would not in anyway interfere with his ability to teach evolution.

ALLEGATIONS OF LAW

21. The Constitutions of the United States and the State of Minnesota protect the rights of teachers to the free exercise of religion and freedom of conscience. U.S. Const. Amend. 1, 14; M.S.A. Const. Art. I § 16.

22. The Constitutions of the United States and the State of Minnesota protect the rights of teachers to freedom of speech and academic freedom. U.S. Const. Amend. 1, 14; M.S.A. Const. Art. 1 §3.

23. The Constitutions of the United States and the State of Minnesota prohibit the establishment of religion, U.S. Const. Amend 1, 14, and interference with liberty of conscience. M.S.A. Const. Art. I § 16.

24. The defendants, and each of them, are "persons" for purposes of the claims of this complaint, as that term is used in 42 U.S.C. § 1983,

25. All of the conduct of the defendants as set forth in this complaint constitutes conduct "under color of state law" as that phrase is used in 42 U.S.C. § 1983.

26. All of the actions of the defendants as set forth in this complaint were done pursuant to a state policy or practice.

27. The rights of plaintiff LeVake to free exercise of religion, freedom from discrimination in employment on the basis of his religion, freedom of speech, academic freedom and due process of law were clearly established at all relevant times.

28. The defendants, acting individually and in concert, and under color of state law are responsible for the decision to deprive the plaintiff of the aforementioned constitutional rights. This action is therefore brought against the defendants in their individual and official capacities.

29. The act of removing plaintiff from his position as biology teacher was done pursuant to a policy of the

District to exclude persons whose religious beliefs conflict with acceptance of evolution as an unquestionable fact from teaching biology. Said policy is in clear violation of the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution and Article 1, paragraph 16 of the Minnesota Constitution.

30. In addition, or in the alternative, the actions of the individual defendants, acting under color of state law, were done pursuant to the individual defendants' view that persons whose religious beliefs are perceived by those defendants to be in conflict with acceptance of evolution as an unquestionable fact should be excluded from teaching biology. Actions taken in furtherance of said view by persons acting under color or state law are in violation of the Establishment and Free Exercise Clauses of the First Amendment of the U.S. Constitution and Article 1, paragraph 16 of the Minnesota Constitution.

FIRST CAUSE OF ACTION
VIOLATION OF FREEDOM OF RELIGION

31. Plaintiff alleges and incorporates by reference all the preceding paragraphs of this complaint,

32. The defendants' removal of plaintiff from his position as biology teacher was based on plaintiff's religious beliefs and/or the defendants' perception of plaintiff's religious beliefs. Defendants' conduct therefore violated plaintiff's federal constitutional right to the Free Exercise of religion as guaranteed by the First and Fourteenth Amendments and protected by 42 U.S.C. § 1983, by placing an undue burden on plaintiffs exercise of his religion, by discriminating against him in terms, conditions and privileges of employment on the basis of his religion, and by singling

him out for disparate treatment on the basis of his religious beliefs.

33. Moreover, by conditioning plaintiff's ability to pursue his chosen profession on his adherence or non-adherence to certain religious or philosophical beliefs, the defendants' conduct violates the Establishment Clause of the First Amendment.

WHEREFORE, plaintiff demands judgment in accordance with the Prayer for Relief below.

SECOND CAUSE OF ACTION
VIOLATION OF FEDERAL FREE SPEECH RIGHTS

34 Plaintiff alleges and incorporates by reference all the preceding paragraphs of this complaint.

35. The defendants' conduct in removing plaintiff from his position as biology teacher because of his views on the theory of evolution, and particularly his past expression of those views violated plaintiff's federal constitutional right to freedom of speech as guaranteed by the First and Fourteenth Amendments and protected by 42 U.S.C. § 1983.

WHEREFORE, plaintiff demands judgment in accordance with the Prayer for Relief below.

THIRD CAUSE OF ACTION
VIOLATION OF ACADEMIC FREEDOM

36. Plaintiff alleges and incorporates by reference all the preceding paragraphs of this Complaint.

37. The defendants' conduct in removing plaintiff from his position as biology teacher because of his views on

the theory of evolution, his past expression of those views and his wish to express those views in the future in the classroom, violated plaintiff's federal constitutional right to academic freedom as guaranteed by the First and Fourteenth Amendments and protected by 42 U.S.C. § 1983.

WHEREFORE, plaintiff demands judgment in accordance with the Prayer for Relief below.

FOURTH CAUSE OF ACTION
VIOLATION OF STATE FREE SPEECH RIGHT

38. Plaintiff alleges and incorporates by reference all the preceding paragraphs of this complaint.

39. The defendants' conduct in removing plaintiff from his position as biology teacher because of his views on the theory of evolution, and his past expression of those views, violated plaintiff's right to freely speak, write and publish his sentiments on all subjects as guaranteed by Article 1, Section 3 of the Constitution of the State of Minnesota.

WHEREFORE, plaintiff demands judgment in accordance with the Prayer for Relief below.

FIFTH CAUSE OF ACTION
VIOLATION OF STATE RIGHT OF FREEDOM OF CONSCIENCE

40. Plaintiff alleges and incorporates by reference all the preceding paragraphs of this complaint.

41. The defendants' conduct in removing plaintiff from his position as biology teacher was based on plaintiff's religious beliefs and/or defendants' perception of plaintiff's religious beliefs. Defendants' conduct placed an undue burden

on plaintiff's exercise of his religion, discriminated against him in terms, conditions and privileges of employment on the basis of his religion, and singled him out for disparate treatment on the basis of his religious beliefs. Defendants' conduct thus violated plaintiff's right of freedom of conscience as guaranteed by Article 1, Section 16 of the Constitution of the State of Minnesota.

WHEREFORE, plaintiff demands judgment in accordance with the Prayer for Relief below.

SIXTH CAUSE OF ACTION
VIOLATION OF RIGHT OF DUE PROCESS

42. Plaintiff alleges and incorporates by reference all the preceding paragraphs of this Complaint.

43. The defendants' conduct in removing plaintiff from his position as a biology teacher was arbitrary, capricious, unreasonable, discriminatory and unlawful and deprived plaintiff of or interfered with, his rights as protected by the Due Process clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution and Article 1, § 7 of the Constitution of the State of Minnesota as protected by 42 U.S.C. § 1983.

DAMAGES

44. As a direct and proximate result of the illegal and unconstitutional acts of the defendants, plaintiff has suffered and continues to suffer the loss of his federal and state constitutional rights to free exercise of religion, freedom of speech, academic freedom, freedom of conscience and due process of law. Plaintiff has been hindered and prevented by the defendants from pursuing his chosen career, has suffered

embarrassment and humiliation, anguish and anxiety which will continue unless the court grants the requested relief.

PRAYER FOR RELIEF

Based on the foregoing, plaintiff respectfully prays the Court to grant judgment as follows:

A. That the Court enter a declaratory judgment declaring that the District's policy, of excluding from biology teaching positions persons whose religious beliefs conflict with acceptance of evolution as an unquestionable fact, to be unconstitutional and illegal under the United States and Minnesota Constitution.

B. That the Court enter a declaratory judgment declaring the action of the defendants in removing plaintiff as biology teacher, to be illegal and unconstitutional.

C. That the Court order the defendants to forthwith restore the plaintiff to his former position of biology teacher.

D. That plaintiff receive compensatory damages in an amount in excess of $50,000.00.

E. That the Court award plaintiff the reasonable costs of this action.

F. That the Court award plaintiff reasonable attorney's fees pursuant to 42 U.S.C. § 1988.

G. Such other relief as the Court deems just.

DEMAND FOR JURY TRIAL

Plaintiff, Rodney LeVake, demands a trial by jury on all issues so triable.

Dated this 24th day of May, 1999.

/s/
Francis J. Manion
AMERICAN CENTER
FOR LAW & JUSTICE -
MIDWEST
6375 New Hope Road
New Hope, Ky 40052
(502) 549-7020

/s/
Wayne B. Holstad
3535 Vadnais Center Dr.
St. Paul, MN 55110
(651) 490-9078
Bar #124461

ACKNOWLEDGMENT

The undersigned hereby acknowledges that costs, disbursements, and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. § 549.21, subd. 2, to the party against whom the allegations in this pleading are asserted.

/s/
Francis J. Manion
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